SUBJECT INDEX

CASES CITED

Supreme Court of the United States

October Term, 1918.

No. 333.

PETER GEDDES, JOSEPH R. WALKER, JOSEPH S. BAER, HENRY S. EVERETT, MARGARET ANN MEEHAN, EUGENE BLUM, ISAAC BLUM, EDWARD BLUM, ISADOR BAER, ALPHONS DREYFOOS; and ALPHONS DREYFOOS, EUGENE BLUM, DAVID C. GOLDENBERG and EUGENE BASCHO, Co-partners doing business under the firm name and style of DREYFOOS, BLUM & COMPANY; LEOPOLD FREUND and ALICE FREY,

Appellants,

v.

ANACONDA COPPER MINING COMPANY, a Corporation, ALICE GOLD AND SILVER MINING COMPANY, a Corporation, and JOHN D. RYAN, J. W. ALLEN, W. D. THORNTON, A. C. CARSON, and E. S. FERRY,

Appellees.

BRIEF OF APPELLANTS.

I. STATEMENT OF THE CASE.

This suit was brought by certain stockholders of the appellee, Alice Gold and Silver Mining Company, to procure a decree annulling a deed of all of its property to the appellee Anaconda Copper Mining Company, made in consideration of the transfer by the latter of 30,000 shares of its capital stock to the first-named company. The appellants,

being the dissenting stockholders, insist that the sale which the deed witnesses should be held void:

(1.) Because neither the board of directors nor a majority of the stockholders of the Alice Company were authorized to sell or dispose of all of its property against the protest of any of its stockholders.

(2.) Because the Alice Gold and Silver Mining Company has no authority to acquire the stock of another corporation, and particularly there is no power or authority in any one, against the protest of any of the stockholders, to transform it from a mining corporation, such as the law and its incorporators made it, to a stockholding corporation.

(3.) Because there is substantial identity between the parties who negotiated and carried out the sale and the parties who negotiated and carried out the purchase; in other words, that the business of the Anaconda Copper Mining Company and the Alice Gold and Silver Mining Company were both controlled by a group represented by John D. Ryan, who is a director of both companies and the president of the Alice Company, and the consideration is inadequate.

(4.) Because the purchase was made in the pursuit of the purpose with which the Amalgamated Copper Company, now succeeded by the Anaconda Company, was organized, namely, to monopolize the production of copper in the Butte camp and the sale of the same in the markets of the world, in violation of the Sherman Anti-trust Act.

The Alice Gold and Silver Mining Company was organized under the laws of the Territory of Utah in the year 1880, its articles defining the powers it was to enjoy as follows:

"The business and pursuit of the corporation shall be to buy, sell, lease, hold, own and operate mines, mining claims, mills, mill sites, furnaces and reduction and refining works; to buy, sell and exchange mineral ores and bullion; to buy, lease, construct and operate roads, tramways, and freight and transportation routes, to facilitate the business of the company; to appropriate, buy and sell water, water rights and ways for conducting the same, and generally to do all kinds of business incident to, connected with, or convenient for the management of a general mining business, in the Territories of Utah, Montana, Idaho, and in any State or Territory of the United States."

Record, Vol. I, page 3.

The merits of the controversy became the subject of inquiry in this suit first before Judge William H. Hunt, upon an application for an injunction to restrain the Alice from disposing of the stock delivered to it by the Anaconda, that it might be available should a decree be made requiring its restoration as a condition of vacating the transfer. Oral testimony was produced, much of which, being reduced, was read by stipulation at the final hearing. The learned judge filed an opinion reviewing the transaction and holding that the relations between the apparent buyer and the apparent seller were so intimate as to cast upon the former the burden of proving good faith, fair dealing, and an adequate price.

Record, Vol. I, pages 166-177.

The injunction was granted.

The final hearing occurred before Judge George M. Bourquin, who likewise considered that owing to the identity of control in both corporations the Anaconda was required to make out a case requiring that the sale be affirmed and that it had not done so; in other words, that the presumption of fraud arising from the circumstances of the trans-

action and the relations of the parties to it had not been overcome. In his opinion, he said:

> "The Court finds that the price paid for the Alice property was substantially inadequate, and because thereof, of the methods of sale, of the nature of the consideration and its intended disposition, and of the dissent of Alice minority stockholders (plaintiffs), the court concludes that plaintiffs are entitled to relief."
>
> Record, Vol. I, page 180.

He held, likewise, that under the circumstances disclosed, the Alice could not become the owner of the Anaconda stock which was to be the consideration for the transfer, the charter of the first named company giving it no authority to acquire property of that character, and there being no conditions taking the case out of the operation of the general rule that a corporation, unless authorized by its charter and the law of the sovereignty creating it, can not acquire or hold stock of another corporation.

The Court did not, however, grant the relief asked, an annulment of the sale, but directed instead that the property should be put up at public auction; that if at such sale it did not bring more than the value of the stock given by the Anaconda for it, found to be $1,500,000, the sale should stand, and that dissenting stockholders should have their proportionate share of that amount of money if they elected to take it for their stock in the Alice; if more should be offered for the property, the sale attacked should be set aside and the property awarded to the successful bidder.

Record, Vol. I, pages 178-189.

There were no bidders at the auction sale and the transfer to the Anaconda was by the final decree affirmed.

Record, Vol. I, pages 152-153.

From that decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit.

Record, Vol. I, page 225.

To avoid any question as to the right of the court to review the proceedings resulting in the decree directing that the property be offered for sale at public auction, conceived by appellants to be interlocutory in character, an appeal was taken from it as well.

Record, Vol. I, page 210.

The decrees entered below were affirmed by the Court of Appeals, Judges Gilbert and Wolverton voting for affirmance (Rec., Vol. II, pp. 989-990), and Judge Ross insisting upon a judgment reversing the action of the District Court and directing the entry of a decree annulling the sale. (Rec., Vol. II, pp. 991-1010.)

The record made in the Circuit Court of Appeals is peculiar. The majority members file what may be denominated a memorandum opinion, beginning, "We concur in the opinion of Judge Ross, except in his conclusion that the sale to the Anaconda Company should be annulled." The opinion of Judge Ross bears all the earmarks of a majority opinion. It reviews at length the complicated facts of the case and canvasses severally the various grounds urged against the validity of the sale.

From the judgment of the intermediate tribunal, an appeal was prosecuted to this Court.

Record, Vol. II, pages 1012-1017.

It will be noticed from a perusal of the opinions filed in the District Court that neither judge before whom the cause came there felt it necessary to go farther in detail than the third ground upon which the sale is challenged. Neither pursued at any length the inquiry suggested by

either the first, second or fourth ground of challenge, though Judge Bourquin intimated that in his view the last is not open to a private litigant, and he reached the conclusion that the Alice could not become the owner of Anaconda stock.

Record, Vol. I, page 186.

Judge Ross held that the appellants could not invoke successfully the Sherman anti-trust act, that the Government alone could complain of its violation. (Rec., Vol. II, pp. 991-994); he held that under the conditions disclosed a sale of all the property of the Alice was authorized and justifiable (Rec., Vol. II, pp. 994-1000); he did not pass on the question of whether the Alice company could become the owner of Anaconda stock, saying:

> "In the instant case the sale was made in exchange for stock in another corporation, with the intention by the board of directors of the Alice company, as is claimed on behalf of the appellees, to thereafter apportion the stock so acquired among the stockholders of the company, or its cash value to such of them as preferred cash, and thereafter to wind up its business and disincorporate the company.
>
> "The appellees dispute both the validity of the exchange and the intent with which it was made, but we find it unnecessary to decide either of those questions, because of the views we entertain regarding the two remaining points presented by the record."
>
> Record, Vol. II, page 1000.

He then expresses his concurrence in the view of the district court that by reason of the intimacy of relationship between the Alice and the Anaconda and the management of both corporations, the burden was cast upon the latter to show the adequacy of the consideration and that it had failed (Rec., Vol. II, pp. 1000-1006); and finally he held that the case of Mason *v.* Pewabic Mining Co., 133 U. S.,

50, to which the district court had referred as authority for the decree, is inapplicable, and that it ought to be reversed. (Rec., Vol. II, pp. 1006-1010.)

It was quite unnecessary, as stated by Judge Ross, if the decree was to be reversed, as he advised, to determine whether the Alice could or could not lawfully hold Anaconda stock, but the majority agreeing with him in all other respects, and omitting altogether consideration of the question last above adverted to, apparently overlooking it entirely, held that the decree was authorized by Mason *v.* Pewabic Mining Company, in which the right of the selling company to hold the stock of the purchasing company was not an issue at all. Either it was empowered by the law of its creation to hold the stock of another company or its right to do so was not raised.

The action of the district court is even more incongruous, for after quite plainly announcing the view that, while under exceptional circumstances one corporation may, though it be not specifically authorized, hold stock of another corporation, the instant case was not brought within the exception to the general rule, so that the Alice did not lawfully become the owner of the Anaconda stock, yet the decree which was eventually entered confirmed the sale and thus adjudicated the Alice to be the owner of 30,000 shares of the capital stock of the Anaconda Company.

To understand the material conditions under which the sale to be investigated was made, it will be necessary to attend to the outlines of the history of the Amalgamated Copper Company, which, for a time, occupied a large place in the industrial life of Butte.

Prior to the year 1899 a number of independent companies were engaged in competition with each other in mining and smelting copper ore in the Butte camp and in the sale of the copper product in interstate commerce. Among

these were the Anaconda Copper Mining Company, then and still the greatest producer of copper in the world, the Washoe Copper Company, the Parrot Silver and Copper Mining Company, the Colorado Mining and Smelting Company, the Boston and Montana Consolidated Copper and Silver Mining Company, and the Butte and Boston Consolidated Mining Company.

The Amalgamated, on coming into existence in the year mentioned, acquired a majority of the stock of the Anaconda and of the Parrot and all of the stock of the Washoe and the Colorado. It soon secured 96,000 shares more of Anaconda and 10,000 of Boston and Montana, the second largest producer in the world, and by 1901 it had acquired all, or at least a majority, of the stock of that great company and of the Butte & Boston, increasing its capital stock to make these latter purchases from $75,000,000 to $155,000,000, when it was master of practically all producing companies in the Butte field except those dominated by F. Augustus Heinze and those owned by W. A. Clark.

Record, Vol. II, page 541.

At the time the Amalgamated was launched there was in progress between Heinze and his companies on the one side, and the Boston & Montana and the Butte & Boston on the other, bitter and protracted litigation, which, as soon as the last-named companies became allied with the Amalgamated, involved it and all its constituent companies. The war was waged for a number of years, vexing the social and political life of the State as well as keeping the courts busy. Numberless lawsuits were instituted and prosecuted, some of them reaching this court and many the Supreme Court of Montana and the Circuit Court of Appeals. Finally a settlement was effected, in the year 1905 or 1906, the negotiations being carried on between Heinze, for himself and his companies, and John D. Ryan,

the president of the Anaconda and a director of the Amalgamated. As a result of this settlement Heinze was paid $10,500,000 and all or practically all of the properties with which he was associated in Butte were transferred to a corporation, organized to take them over, known as the Red Metals Mining Company. All of its stock, of the par value of $11,000,000, was immediately acquired by another company organized to hold it, with a capital stock of $15,000,000, called the Butte Coalition Company. Of the stock of this company the Amalgamated became the owner of 50,000 of the 1,000,000 shares. Its officers and leading spirits took stock in the new organization.

While the negotiations looking to the settlement of the Heinze-Amalgamated litigation were in progress, John D. Ryan, then a director of both the Amalgamated and the Anaconda and the president of the latter, procured an option on more than a majority of the stock of the Alice Company. It owned at that time, and had owned for many years, about 150 acres of mining ground in the Butte camp adjacent to properties belonging to companies subsidiary to or being constituents of the Amalgamated. Before the days when Butte became known as a distinctively copper camp, the Alice ground had been extensively worked for silver, but after the slump in that metal in the early nineties operations were carried on in a desultory manner and on a small scale in the upper levels, the lower workings being flooded. The returns were not sufficient to meet the expenses incurred on account of taxes and for the care of the property. The deficiency was met by the holders of the block of stock optioned to Ryan, the Walker Bros. of Salt Lake, Utah,

Record, Vol. I, page 434,

the total obligations of the company when Ryan became interested in it amounting to about $27,000. On the organization of the Butte Coalition he transferred to it his

option on the Alice stock and that company took it over, acquiring 234,215 shares at $1.50 per share. Ryan thereupon became a director of the Alice, and at the time of the transfer here involved was its president .

Record, Vol. I, pages 391-400; Vol. II, page 618.

In the year 1909 those in control of the Amalgamated conceived it to be wise to have the title to all the properties of its constituent companies transferred to the Anaconda. Pursuant to this plan its capital stock was increased from 30,000 shares to 150,000. Propositions were solemnly made by the Anaconda to each of these and as solemnly accepted by a vote of the stockholders of the latter, to give a certain number of shares of Anaconda stock for all the property of the companies to be absorbed. Thus, in exchange for its stock, the Anaconda acquired the great properties of the Boston & Montana, the Butte & Boston, the Washoe, the Parrot, the Colorado, and the Red Metals, each of which companies, pursuant to the plan, were, by regular proceedings, dissolved. On the dissolution of the Red Metals its Anaconda stock went to the Butte Coalition. The plan either originally contemplated the acquisition of the properties of the Alice as a constituent company of the Amalgamated or it was enlarged to embrace that company as such. However, while the consolidation referred to was going on, the Alice directors, including Ryan, called a meeting of the stockholders to be held May 2, 1910, to consider ratifying and confirming a contract of sale of all the property and assets of that company to the Anaconda for 30,000 shares of its stock.

Record, Vol. II, pages 632, 633.

The ratification duly came from a meeting at which 289,590 shares of the stock were voted for it,

Record, Vol. I, page 342,

all but 3,700 shares being cast under proxies by E. S. Ferry, a member of the firm of Richards, Richards & Ferry, Salt Lake attorneys for the Alice Company. 100 shares standing in his name, but actually owned by the Butte Coalition, he voted in his own right; 2,200 shares were voted under "substitute proxy" by F. S. Richards, a member of the firm named, and 1,100 shares by Willard Hamer, a clerk in its office, and 300 shares by D. Gay Stivers, of the legal force of the Anaconda Company, who held a proxy. Of the total affirmative vote, 234,215 shares, as stated, were owned by the Butte Coalition, the stockholders of record being dummies.

Record, Vol. II, page 618.

Pursuant to this resolution, Ryan, as president of the Alice, being at the same time a director of the Amalgamated and the Anaconda, on May 31, 1910, executed the deed sought to be set aside herein, through which there was conveyed, in form, to the Anaconda all the property of the Alice.

The foregoing brief summary will now be supplemented with further references to the testimony bearing severally upon the propositions relied upon by the appellants.

(1.) *The Sale of the Entire Property of the Alice.*

Authority to dispose of all the property of the corporation notwithstanding the protest of minority stockholders is justified, first, under a statute of the State of Utah, enacted in 1905, and second, under the rule which authorizes majority stockholders to close out the business of an insolvent or failing corporation. Was the Alice such? The company paid dividends regularly from 1881 to 1898, inclusive, except for the years between 1891 and 1896.

Record, Vol. I, pages 380-381.

The properties of the company had been developed to a depth of 1,500 feet.

Record, Vol. II, page 936.

In the old days the ore, silver, was worked by the pan amalgamation process,

Record, Vol. I, page 377,

there being a mill on the premises.

Record, Vol. I, page 374.

After 1894, the property was worked chiefly by leasors or tributors, the water having been allowed to raise first to the 1,000 and afterwards to the 700 foot level. The mill was closed down in 1899.

Record, Vol. I, page 374.

The shaft-house burned down in 1902, and some new machinery was put upon the property to hoist the ore extracted by the tributors.

Record, Vol. I, page 374.

The expenditures in connection with the property were for insurance, taxes, and watching the property.

Record, Vol. I, page 376.

The deficiency was made up through the New York office of the Alice Company,

Record, Vol. I, page 373,

the debt being carried by the Butte Coalition Company, after it became interested March 31, 1906.

Record, Vol. I, page 447.

It amounted to $27,784.75 at that time, but swelled in three years, nine months, under the new management, to $34,101.56,

Record, Vol. I, pages 447-448,

including $1,901.61 expenses of the eastern office, which, by the way, was on the same floor and adjacent to the offices of the Amalgamated, the Anaconda and the Butte Coalition in the city of New York. Of the aggregate indebtedness $19,575.23 had been incurred in the construction of the new hoist after the destruction of the old one by the fire. More detailed information concerning the property will be set out in connection with the testimony on the subject of value. It is sufficient to say here that the Alice was known to contain large bodies of lead and zinc ores.

Record, Vol. I, pages 374-375.

The properties were adjacent to rich producing copper mines, the veins being worked in them passing, in the opinion of some of the witnesses, into the Alice ground. The stock given by the Anaconda for the assets of the former company was admitted to be worth $1,200,000 and was claimed by appellees and found by the court to be worth $1,500,000.

Record, Vol. I, page 145.

(2.) *The Sale of Stock.*

Conceding the right of the majority stockholders of the Alice to force a sale of all the property of the company, it is insisted by the appellants that such a sale, or exchange rather, could not be made for stock in another company, thus transforming the Alice from a mining company to a stockholding company. To this contention it is answered

that when a company is authorized to sell all its property in bulk it may, as a part of the process of liquidation, accept stock in payment, such stock to be converted into cash for distribution among the stockholders, and that the stock in question was accepted as a part of a plan of dissolution of the Alice.

The sale was authorized by a meeting of the stockholders of the Alice held pursuant to a notice which gave no intimation of a purpose to dissolve the corporation.

Record, Vol. II, pages 632-633.

It was accompanied by a letter from the directors which held out as an inducement that various corporations, to wit:

> "The Boston and Montana Consolidated Copper and Silver Mining Company, Washoe Copper Company, Big Blackfoot Lumber Company, Butte & Boston Consolidated Mining Company, Trenton Mining & Development Company, Red Metals Mining Company, Diamond Coal & Coke Company, and Parrot Silver & Copper Company (all constituent companies of the Amalgamated), have taken steps to effect a consolidation of all the property owned by them, by a sale of their respective properties to the Anaconda Copper Mining Company, for certain amounts of the capital stock of the Anaconda Copper Mining Company."
>
> Record, Vol. I, page 444.

The letter continued:

> "By the consolidation above referred to the Anaconda Copper Mining Company has acquired the most important mining ground in the Butte District, and it is believed that it will be enabled, through the adoption of general systems of drainage, ventilation, and development, to prospect in an economical manner the undeveloped portion of the property thus acquired.

"This company is the owner of comparatively large areas of mining property which lie contiguous to some of the property belonging to the Anaconda Copper Mining Company, and which it is believed are of sufficient value to justify prospecting and development, provided the same can be carried on by a company strong enough financially to bear the burden of so doing."

Record, Vol. I, page 445.

"You are therefore advised that in the opinion of the management it would be to the best interests of this company and its shareholders to accept the proposition of the Anaconda Copper Mining Company."

Record, Vol. I, page 446.

Nearly a year thereafter a meeting of the stockholders was called to consider a proposition to dissolve the company.

Record, Vol. II, pages 674-675.

(3.) *Identity of Control of Alice and Anaconda.*

At the time of the purchase and since 1906 the Butte Coalition owned a majority of the stock of the Alice.

Record, Vol. I, page 376.

Every director of the latter was a dummy holding the stock that stood in his name for the Butte Coalition, as will appear by the list at page 446, modified by resignations and appointments recited at page 624 and the testimony of the secretary at pages 617-618.

With the notice of the meeting, blank proxies were sent out from the New York office of the Alice, which was also the office of the Butte Coalition, authorizing either one Thornton or Ferry, heretofore referred to, or *Mr. Kelley,*

who was the general counsel of the Anaconda Company at Butte, to vote the shares of the stockholders.

Record, Vol. II, pages 618-619.

Kelley did not attend the meeting, but D. Gay Stivers, another of the attorneys of the Anaconda Company at Butte, did. He held a proxy for 300 shares and voted them for the resolution of ratification.

Record, Vol. I, page 338.

He was made secretary,

Record, Vol. I, page 322,

and a member of a committee to examine proxies.

Record, Vol. I, page 329.

No letter was sent to Mr. Ferry, who did most of the voting at the meeting, instructing him how to vote the proxies which in such generous numbers came into his hands.

Record, Vol. II, page 619.

Mr. Allen assumes that Ferry got directions either from Mr. Kelley or Mr. Thornton and believes that inasmuch as Stivers attended the meeting "it is very probable that instructions were carried by him."

It will be borne in mind that the Amalgamated owned 50,000 shares of Coalition stock and that the officers of the former became subscribers for its stock upon its organization; that it came into existence to hold the stock of the Red Metals, which was organized to take over the Heinze properties pursuant to the settlement. The furious contests between the owners of the two groups of properties ceased. The purchase disposed of the litigation.

Record, Vol. I, page 382.

All rights of action by any of the Heinze companies against any of the constituent companies of the Amalgamated were assigned to one T. F. Cole, a close business associate of John D. Ryan, who proposed to release them all, if the Amalgamated would procure to be released all claims which any of its constituent companies had against the Heinze companies or any of their officers.

Record, Vol. II, page 552.

This proposition was accepted and the slate wiped clean.

The suits were all dismissed and none ever after arose between the Amalgamated or any of its constituent companies and the Red Metals.

Record, Vol. I, page 270.

Indeed the attorneys for the Anaconda became the attorneys for the Red Metals (*Id.*), as well as for the Alice.

Record, Vol. I, pages 272, 372.

The superintendent or custodian of the Alice, after the Butte Coalition acquired its stock interest, got his orders from Mr. Gillie, whom he recognized as his superior officer.

Record, Vol. I, page 373.

Gillie had the direction of the mining operations of the Amalgamated companies in Butte.

Record, Vol. II, pages 932, 877.

He sometimes countersigned the checks of the Alice. Sometimes this was done by one Alley, whose office was entered through the general waiting room of the legal department of the Anaconda Company.

Record, Vol. I, page 373.

Value.—The property in question embraces practically a mile of the outcrop of the great Rainbow Ledge, made up of many associated veins. It is traceable by actual workings for miles on the surface, pursuing the course of an arc, from which fact it may have taken its name.

Record, Vol. II, page 724.

It is said by one of the witnesses, without contradiction, to be "by far the largest and most continuous outcrop" in the Butte district.

Record, Vol. II, page 725.

The workings in the Alice ground have been adverted to. Actual mining operations were being conducted on the extension of the Rainbow Lode to the east of the Alice ground in the Poser and the Elm Orlu, owned by Senator Clark, and in the Black Rock, owned by the Butte Superior Company (*Id.*). From both of the former a very considerable tonnage of copper ore has been shipped.

Record, Vol. I, page 395.

and they have both been heavy producers of zinc ore (*Id.*). In the early part of the year 1910, the operations being carried on by the Butte Superior on the Black Rock had reached a stage at which financial success was assured.

Record, Vol. II, page 733.

These claims, and particularly the Black Rock, had been worked for many years for silver, as had the Alice.

Record, Vol. II, page 739.

The zinc ores are now being profitably reduced after much experimentation and the development of new processes.

Record, Vol. II, page 839.

These made such ores a commercial product in the Butte Camp for the first time in 1910.

Record, Vol. II, page 786.

The works of the Butte Superior are capable of treating 1,000 tons daily.

Record, Vol. II, page 811.

The Alice is known to contain such ores in great abundance. Very considerable bodies were encountered in the operations conducted therein,

Record, Vol. II, page 898,

but they were left undisturbed because the presence of zinc interfered with the successful treatment of silver ores by the processes in vogue in the old days.

Record, Vol. II, pages 890, 832-833.

Samples of these ores taken from above the 600-foot level,

Record, Vol. II, page 888,

showed a very small percentage of copper.

Record, Vol. II, pages 906-907.

In veins intersecting the Rainbow within the Alice ground pursuing a northwesterly-southeasterly direction, hereafter to be referred to, great copper producers, ore in commercial quantities is rarely found above the 1,000-foot level. In the opinion of an expert examined by appellants copper bodies will be found in the Alice.

Record, Vol. II, pages 731, 749.

The history of the Butte district shows that veins worked for silver near the surface became copper producers with depth,

Record, Vol. II, pages 732, 757,

the theory being that the copper has leached out down to the point where the oxidization ceased.

Record, Vol. II, page 757.

Another expert examined by the appellants, of wide experience and renown, Walter Harvey Weed, testified that copper ore would be found in the Alice ground and in the Rainbow Lode. He had been engaged at some work about Clark's Elm Orlu and had seen as much as 150 tons per day of high-grade copper ore taken from that claim and from the Rainbow Lode.

Record, Vol. II, page 800.

He had learned from old statements concerning the Alice that copper was found in the lead-silver ores, a feature that was embarrassing in the smelting operations, to the amount of 1.1 to 2 per cent, giving them a value for the copper content under modern processes.

Record, Vol. II, pages 800-801.

"Finding copper ores of value in the Rainbow Lode," is, in his opinion "a geological probability."

Record, Vol. II, page 811.

But he would first conduct explorations to find copper in the veins which enter the property from the southeast.

Record, Vol. II, page 802.

Two of these known as the Jessie Vein and the Edith May Vein, have been extensively worked for a long distance to the southeast and to great depths, over 3,000 feet. The former is being worked very extensively and profitably in the Badger State claim, an Anaconda property, shown on the map to be in close proximity to the Alice ground,

Record, Vol. II, page 729,

and a shaft has been sunk on the Moose, another Anaconda property, a small fraction contiguous to the property in question here, probably on one or the other of the veins above named.

Record, Vol. II, pages 730, 815.

The Badger State is one of the greatest producers in Butte, yielding more than 10,000,000 pounds of copper in 1913.

Record, Vol. I, page 441.

This great mine developed within 500 feet of the Alice ground, was opened up during the period between the acquisition of the Alice stock by the Butte Coalition under the Ryan option and the time when the transfer in controversy was effected. In the report of the Boston & Montana Company for 1909 occurs the following:

> "This shaft (the Badger State shaft) had, on December 31st, 1909, reached a depth of 1,548 feet, and has been sunk in the northwestern portion of the Butte Camp, in order to develop the Badger State and Auraria claims owned by this company. The ore bodies have no connection whatsoever with those that have been developed by the shafts already mentioned, but the work thus far done, gives promise of very gratifying results."
>
> Record, Vol. II, pages 575-576.

The bright promise it held out continued undimmed for, in a later report, either for the year ending April 30, 1910, or April 30, 1911, it was said:

> "This shaft is situated in an entirely different section of the Butte Camp from that in which are located the shafts which have been reported under the heading of the Boston and Montana Department; as it lies in a northwesterly direction from them, and distant

several thousand feet. It is now eighteen hundred feet in depth, two hundred and eighty-three feet having been sunk during the year. Stations have been established at the thirteen hundred, sixteen hundred and eighteen hundred foot levels, and several veins of great promise have been developed, showing good widths, and a grade of ore higher in copper values, and carrying an average silver value, greater than that of any of the other mines. *There is a general opinion among those familiar with this property and its development, that it is destined to become one of the great mines of the district. Development work is being pushed with vigor.*"

Record, Vol. II, page 577.

"The Jessie vein is open to probably within 500 feet of the Alice ground and the Edith May much closer than that," according to the testimony of Reno Sales, geologist for the Anaconda Company.

Record, Vol. II, page 925.

It is cut in the Badger State claim on the 200 level and on the 1,000 level.

Record, Vol. II, page 929.

The report for 1912 shows that the greatest values in that claim were encountered on the 1,600 and 1,800 levels.

Record, Vol. II, page 578.

They were still going down. Development progressed with very gratifying results, the average daily output for the year being 550 tons.

Record, Vol. II, page 579.

In the same report the shaft in the Moose, still west of the Badger State and contiguous to the Alice property, was the subject of the following mention:

"Many years ago, the ground adjacent to the Moose shaft, lying in a westerly direction from the Badger State mine, was worked to a depth of five hundred feet with fair success for ores, carrying silver values only. During the year 1913, it is proposed to start sinking the Moose shaft to a depth of eighteen hundred feet, and to prospect the veins at greater depth. This shaft can also eventually be connected with the Badger State workings, and will be of great assistance in perfecting ventilation."

Record, Vol. II, pages 579-580.

There has been a very material expansion of the copper producing area of the Butte district and in the direction of the Alice ground in more recent years.

Record, Vol. II, page 792.

Some evidence was introduced on behalf of the appellees to show that the zinc ores of the Alice are refractory in character and the metallurgist of the Butte and Superior Company, a gentleman to whom much of the success of that company is due, testified, as a result of tests made by him, that ores such as samples provided him, from the upper levels of the Alice, could not, in his opinion, be worked at a profit,

Record, Vol. II, page 868,

but he admitted that his company struggled along for six years before he came to it in an effort to perfect its methods of treating the Butte Superior ores, without making a success, and that most satisfactory results had since been obtained because of the improvements in the system of treatment of the ores.

Record, Vol. II, page 873.

He thought it possible that at some future time the Alice ores could be treated successfully.

Record, Vol. II, page 873.

Dr. Weed, however, expressed himself as of the belief that the zinc ores of the Alice mine can be successfully worked by existing processes.

Record, Vol. II, pages 789-823.

An attempt was made at one time to treat these zinc ores of the Alice, with what skill or command of metallurgical science does not appear, but the plant burned down and the effort was abandoned.

Record, Vol. I, page 418.

Since the Anaconda acquired the property it provided two different zinc companies with samples of the ores for experimentation, but they both reported unfavorably and efforts to induce "practical zinc people," Mr. Ryan testified, to take a lease of the property had failed.

Record, Vol. I, page 420.

The Anaconda itself never did any experimentation.

Record, Vol. I, page 398.

The reports from the two companies said to have reported were not offered, nor were the terms upon which lessors were invited to take hold of the property disclosed.

No opinion was ventured by any witness for the appellees as to the value of the property, though the president of the Anaconda, its superintendent of mines and its geologist testified.

As a step in the consolidation through which the title to all the properties was united in the Anaconda, three experts were sent out to examine them. They made a report, which presumably embraced the Alice and must have placed either an absolute or a relative value upon the properties of the companies respectively.

Record, Vol. I, page 408.

The report was not produced, though called for, nor was any one of the three called upon to testify.

Dr. Weed and the other expert called by the appellants on the subject of value, Mr. Corry, both testified that the properties of the Alice at the time of the sale were worth $3,000,000, the latter fixing the value at 3 1-4 millions.

Record, Vol. II, pages 791-734.

Both say, however, that in view of conditions they would have advised against selling at that time, for various reasons, among others, that development of great importance was going on in adjacent properties, the producing area was being gradually extended in the direction of the Alice properties, mining methods were being improved and cost of extraction and reduction being reduced and metallurgical processes and particularly those for the treatment of zinc ores being discovered and developed.

Record, Vol. II, page 791.

(4.) *The Sherman Law.*

The Amalgamated Copper Company acquired on its organization with a capital stock, speedily raised to $75,000,000, the majority of the stock of the Anaconda, the greatest copper company in the world, a majority of the Parrot, and all of the Washoe and the Colorado.

These were all highly prosperous companies, engaged in mining and smelting copper ores and in shipping the product to the ends of the earth, where it was sold through some commission house. It acquired as well all the stock of the Diamond Coal and Coke Company,

Record, Vol. I, page 409,

supplying coal to the mines and smelters, all of the stock of the Big Blackfoot Milling Company, providing

timber for them, and the stock of the Hennessy Mercantile Company, operating a great department store in trade with the miners. It took in quite an additional bunch of companies subsidiary to the Anaconda engaged in various mercantile lines and profitable because of the operations of that company, for all of which it paid the $75,000,000, the purchase being authorized at a meeting held April 27, 1899, one William S. Bogert lumping off the whole collection at that figure to the new organization.

Record, Vol. II, pages 491-492.

On September 21, 1899, it acquired 42,000 shares more of Anaconda,

Record, Vol. II, page 546,

and on December 21 the purchase of 54,000 more shares of Anaconda was authorized and 10,000 shares of Boston & Montana, next to the Anaconda in point of production among the copper companies of the world.

Record, Vol. II, page 509.

Where the money came from to make these later purchases is not disclosed, the ledger of the company—No. 1, covering the period from 1899 to 1905—having in some unaccountable manner disappeared.

Record, Vol. II, page 510.

The recital above, sustained by repeated declarations emanating from the Amalgamated, that all of the Colorado stock was acquired, is not altogether accurate, for it appears that as one of the last acts of a meeting held May 22, 1899, the treasurer was authorized to purchase 17,354 shares of Colorado "not already acquired" for a trifle of a half of a million or so,

Record, Vol II, page 501,

from which we gather that all the stock mentioned at pages 485 and 486 above referred to, or at least the Colorado stock, had been acquired. However, at the April 27th meeting, the National City Bank was authorized to receive subscriptions for the entire issue of the capital stock except ten shares,

Record, Vol. II, page 498,

whereupon it forthwith put out a notice to the effect that the company had "already purchased large interests in Anaconda, Parrot, Washoe, and Colorado," and asked for subscriptions to the entire issue of the capital stock of the company.

Record, Vol. II, page 707.

Just how it had acquired these large interests before it had a dollar and was prepared to say, simultaneously with its request for subscriptions for all its stock, that it had already secured such interests, it is perhaps unnecessary to inquire.

But it started off master of more productive copper properties than were ever before brought under one control.

In 1901 it acquired the great properties of the Boston & Montana and the Butte & Boston, by the purchase nominally from Kidder, Peabody & Company of more than a majority of the stock of those companies,

Record, Vol. II, page 521,

increasing its capital stock to take them in to $155,000,000,

Record, Vol. II, page 541,

when it had practically all there was in Butte save the Heinze and Clark properties. The former it in effect acquired, in manner hereinbefore set out, on the settlement of the litigation in 1906, paying $10,500,000, and eventually by transfer to the Anaconda, and the latter in 1910 by pur-

chase for $5,000,000 more. At the time the depositions were taken its investments totaled $184,000,000 odd.

Record, Vol. II, page 550.

In 1899, when the Amalgamated came into existence, the Butte camp was producing nearly half of the copper output of the United States, 238,000,000 pounds approximately, out of a total of 581,000,000.

Record, Vol. I, pages 291, 290.

1. The annual production of its constituent companies at that time was as follows: Anaconda, 120,000,000; Boston-Montana, 63,000,000; Butte and Boston, 12,000,000; Colorado Smelter 10,000,000; Parrot, 15,000,000; total 220,000,000.

Record, Vol. II, page 713.

In 1910, the total production in the United States was 1,086,115,430 pounds, of which Montana contributed 288,449,425.

Record, Vol. I, page 291.

In 1911 other producers in Butte put out not to exceed 42½ million pounds,

Record, Vol. I, page 292,

less than 15 per cent of the total production. 30,000,000 pounds of the 42 1-2 millions were produced by the North Butte Company, organized by Ryan and Cole. On its organization H. H. Rogers, president of the Amalgamated, subscribed for $100,000 of the stock.

Record, Vol. I, pages 403-404-405.

In view of the statement of Ryan in the course of the testimony just referred to,it would seem that he is misquoted

at page 385, where he is represented as saying that he had nothing to do with the organization of the North Butte.

The reports of the Amalgamated tell of harassing apex suits in Butte, but it never had any serious trouble with the North Butte.

Record, Vol. I, page 390.

The story of the acquisition of the Heinze properties has been told in sufficient detail. The Clark properties, like those of the Alice, were acquired while the consolidation was going on which vested the title to all of them in the Anaconda. The actual transfer was made June 1, 1910, though the purchase occurred a few months before that date.

Record, Vol. I, page 405.

This purchase was made while there was pending a controversy between Clark and the Amalgamated such as to call for the activities of engineers and lawyers in connection with it.

Record, Vol. I, pages 390-391.

An attempt is made to justify the consolidation of 1910 on the basis of economy and for the purpose of eliminating apex controversies among the subsidiaries.

Record, Vol. I, pages 310-315.

No explanation whatever is offered for the consolidation brought about by the organization of the Amalgamated.

As to the apex controversies, they seemed to have been adjusted without difficulty and the constituent companies never got into court because of them.

One of the appellants testified to a conversation with Mr. Kelley, general counsel for the Anaconda Company, in which the latter said, apparently apropos of the consolida-

tion then going on, that the Federal Government is opposed to holding companies.

Record, Vol. II, page 691.

Though Mr. Kelley was examined as a witness he made no reference to this testimony.

When the Amalgamated got control of the stock of these companies, respectively, it dismantled the smelters at Butte, that of the Parrot in 1899, of the Butte & Boston in 1901 or 1902, and of the Colorado in 1905.

Record, Vol. I, page 289.

Similarly the Montana Ore Purchasing Company smelter, a Heinze plant, went out of commission when the famous litigation was settled and the properties with which he was associated passed to the Red Metals. And so the Butte Reduction Works, otherwise known as the Clark smelter, when his copper properties went to the Amalgamated. No copper smelters are left in Montana save the two owned by the Anaconda, one at the city of Anaconda and the other at Great Falls, and one at Butte owned by the Pittsmont Company.

Record, Vol. I, page 289.

The story of the purpose with which the Amalgamated was organized is told by Thomas W. Lawson, a witness examined for the appellants, as follows:

> "In the work of organizing that company, I was associated with the late Henry H. Rogers and Albert C. Burrage. The company was organized in the month of April, 1899; I should say from memory that I had been conferring and negotiating with those gentlemen and others for three years before that time. Upon the organization of that company, there was turned over to it a controlling interest in a number of mining corporations; the stocks of

which were acquired from the promoters of the company. I had a part in the purchase of some of the stocks, which were thus eventually transferred to the company on its organization. The particular companies whose stocks we were actively engaged in securing immediately prior to the organization of the Amalgamated, I should say were the Anaconda, Boston & Montana, Butte & Boston, and the Parrot. Speaking generally, our plan was this: We intended to purchase the controlling interest in certain producing copper mining companies, those I have particularly named and others. I distinguish between the two because we did purchase some and abandoned the purchase of others, the purchase of which was contemplated at the beginning. Our intention was to put them into a consolidation, amalgamation—into some larger holding corporation to be organized later, for the purpose of more advantageously and profitably conducting the copper business; conducted separately at that time by the different companies we were to absorb, or hoped to absorb. Other companies we intended to absorb were the Calumet & Hecla, and Osceola, and some properties of which I cannot recall the names, controlled or owned by Senator Clark at Butte; and some other copper companies in the Lake Region; also the Arcadia and Isle Royale. The advertisement in the Boston Herald of May 8th, 1899, over my signature contained the following statement:

" 'The Amalgamated Copper Company is the company into which is to be merged all sound producing copper companies that are now paying and after close investigation prove good and will pay in the future over 8 per cent on the par value of the stock which the Amalgamated Company issues.'

"It accurately states the purpose as it was developed in the course of my negotiations with my associates. I do not believe we intended at that time to purchase the United Verde. If we could have purchased, we would have been very glad to get it, but we feared at that time we would not be able to purchase the property from Senator Clark. Generally

speaking the plan contemplated the acquisition of all producing copper mines in this country, which we might be able to purchase upon any reasonable terms. We intended to purchase all of the stock of each company, in which we could purchase a controlling interest, if it were possible and feasible. I think we also talked of acquiring the Rio Tinto. In the article which appeared in 'Everybodys' for the month of October, 1914, written by me, there appears the following statement:

"'In 1896 I formulated and perfected the plans for "Coppers," a broad and comprehensive project having for its basis the buying and consolidating of all the best producing copper properties in Europe and America, and educating the world to their great merits as safe and profitable investments'; which states succinctly the plan which I had in mind. A fair statement of our purpose appears in the New York "Sun" of April 28, 1899, in the article headed "Here's the Copper Pool," as follows:

"'The copper combination materialized yesterday. The new company will combine nine copper mining companies. Its purpose will be so far as possible to give stability to the copper market. It is not proposed to advance prices but rather to prevent an undue advance, as by keeping the prices upon a fair basis it is believed that the demand for the metal will be fostered and the profits of the company be all the greater. Economies in the business will be instituted.'"

Record, Vol. II, pages 700-702.

In the year 1911 the Amalgamated acquired all of the stock of the United Metals Selling Company, since its organization the greatest copper selling agency in the world. It sold for the Amalgamated.

Record, Vol. I, pages 408-409.

Mr. Lawson tells of its coming into being thus:

"I know about the United Metals Selling Company. It was organized about the same time or

shortly after. The principal business was the old copper selling agency business of the Lewisohns. Their business was taken over, I think, as a whole and it was made the basis of the new selling agency. This company had contracts with a number of the larger producing copper mining companies, contracts to sell their metal for them—finance them during the selling of it, give them credits, and in a general way what is known as the copper selling agents business, charging a commission for the work done. I think the Amalgamated Copper Company became the owner of some stock—the controlling interest—in the United Metals Selling Company. Subsequently I think it acquired all of it. The organization of the United Metals Selling Company was in contemplation at the time of the organization of the Amalgamated Copper Company, as a part of a general scheme to market the copper to a finality. My article in 'Everybodys' heretofore referred to, states the case, the conditions, about as they were as follows:

"'On the board of directors, too, was Governor Flower of the financial and brokerage house of Flower & Company, who had acted as fiscal agents for the corporation at its formation, nor must I forget the Lewisohn Brothers, who had been induced to turn in all their copper business at actual cost to be incorporated in the United Metals Selling Company, a part of the Amalgamated scheme, but not included in the corporation, and every one of these had elaborate assurance that he was in on the cellar floor.'

"As regards the reason for acquiring the selling agency, I will say that in the carrying out of our general scheme, the general scheme which was contemplated all the way through, it would have been very essential to have the marketing of the whole product of the different mines controlled or owned by the consolidated company, as the very foundation idea of the whole scheme was the control of the price of the metal, control to an extent that we could keep the price from the wild fluctuations that had been the history of copper metals from the beginning. In other words, a control that would have enabled us to establish a fair

price and to hold that fair price through the ups and downs of general business, through the periods when the metal would be in strong demand, when the demand would let up, and there would be accumulation or overproduction, a temporary overproduction, and the very essential of that would be a control in the sense which I stated, of the selling, of the getting the metal to the consumer."

Record, Vol. II, pages 702-704.

The delay about taking over the stocks of the Boston & Montana and the Butte & Boston, Mr. Lawson explains in the following testimony:

"The original acquisition of its assets by the Amalgamated did not include any of the stock of the Butte and Boston or the Boston-Montana, but we had, prior to its organization, secured a considerable amount of the stocks of these companies for the people who were organizing the Amalgamated. At that time in Montana, the management of the Butte and Boston and Boston-Montana was harmonious with the management of the Amalgamated. The reason that the Amalgamated did not acquire immediately upon its organization the stocks of these two companies was that in the beginning and up to within a comparatively short time of the organization of the Amalgamated company, we had intended to have the Boston and Montana, and Butte and Boston stocks the first stocks to be absorbed, but in the meantime Mr. Rogers had been able to acquire from Mr. Marcus Daly the control of the Anaconda property, which had not been originally contemplated, or the control of which had not been originally contemplated, until after the Boston-Montana and Butte and Boston had been arranged for; and that would necessitate a larger amount of capital at the start, than Mr. Rogers and Mr. Rockefeller and some of our associates thought was advisable, so in a general way it was decided to bring the contemplated Amalgamated property to the public in sections, and what was to have

been the first section was shifted to the second, so that in the first section could be included this large amount of Anaconda. They had secured a control of the Butte property. They had not purchased the control of the Boston-Montana, but could speak for the control of it—options in some cases, and friendly relations with the larger holders in others."

Record, Vol. II, pages 704-705.

The leading spirit or master mind in effecting the consolidation was Henry H. Rogers.

Record, Vol. II, page 704.

On perfecting the plans to bring out the Amalgamated, Lawson, on the suggestion of Rogers, and two other associates, wrote out and caused to be inserted in the "New York Sun" and the "Boston Herald" an advertisement signed by Marcus Daly, H. H. Rogers, and Wm. G. Rockefeller, inviting subscriptions to the stock of the Amalgamated. The attention of the witness was called to the following from Moody's "The Truth About the Trusts:"

"While the result turned out far otherwise, in the original plan both judgment and sanity prevailed, for it was purposed not merely to form a combination of a few of the larger producers embracing a copper production of only about 150,000,000 pounds per annum out of a total of about 1,200,000,000 pounds as the world's production, but to logically proceed from this nucleus to a much larger trust which would first perhaps take in the United Verde, Calumet & Hecla, and every large copper mining interest in this continent and extend ultimately to other continents, embracing the Rio Tinto properties of the Rothschilds as well as all other important producers. In the carrying out of these plans it was estimated that to acquire approximate control of the entire copper production of the world, about 1,200,000,000 pounds per annum, would involve the issuance of an approximate share capital of $1,200,000,000, thus capitalizing

copper production at the rate of one dollar for each pound of copper produced. The original formation of the trust was, therefore, based on a sound proposition from the standpoint of its promoters and on the only broad rational basis, that any trust that contemplates the issuing of watered capitalization in large amounts can be based on, and be successful. It aimed at and saw the necessity for acquiring a monopoly of the copper production of the world, the purpose being to restrict the production to what might be the legitimate at about twenty-two cents per pound."

Record, Vol. II, pages 714-715.

Of this statement he said:

"That is a fair statement of facts, with quite a decided stretching, perhaps, of conclusions. I do not agree with the trust—where they bear down on the trust end and the restrictions, etc., as I think they are wrong there. We did intend to capitalize the copper of the world on about a dollar a pound basis, which we believed to be a fair one, and I believe so yet."

Record, Vol. II, page 715.

No testimony was offered by appellees to overcome the foregoing from one who undoubtedly was concerned in bringing the Amalgamated into being; but the appellants having called one Albert C. Burrage, likewise participating, an effort was made to draw from him vindicatory expressions. How successful this attempt was may be shown to the court by appellees.

In the year 1905 the Amalgamated sent out to its stockholders a statement from which the following is taken:

"The Amalgamated Copper Company was organized in April, 1899, with a capital stock of $75,000,000. For three months prior thereto, copper was selling at between sixteen and seventeen cents a pound, and there was no accumulation of stocks in the hands of the producers. Scarcely any new discoveries of

copper had been made in the United States for several years, and the uses of the metal were so rapidly increasing, especially in the electrical field, that the most experienced observers of the market were of the opinion, that the price of the metal would not again fall under fourteen cents a pound, until new and extensive sources of supply were developed, of which there was then no present indication."

Record, Vol. II, page 582.

Whatever may have been the limits within which its projectors intended the Amalgamated should operate, it early acquired extensive interests in Arizona and Mexico, holding stock in the Inspiration and Greene Cananea.

Record, Vol. II, page 512.

Its successor, the Anaconda, has more recently acquired a stock interest in the International Smelting and Refining Company, owning or controlling, through stock ownership, a lead and copper smelter in Utah, a copper refinery in New Jersey and a lead refinery in Indiana.

Record, Vol. II, pages 860-861.

These acquisitions contemplate a further issue of Anaconda stock to the amount of the purchase price, as stated (*Id.*).

The Boston & Montana paid dividends at the rate of 172 per cent of the par value of its stock the year before it was absorbed,

Record, Vol. II, page 537,

and the Butte & Boston 50 per cent besides reducing its indebtedness materially.

Record, Vol. II, page 538.

Upon the foregoing the appellants make the following:

II. SPECIFICATIONS OF ERROR.

I.

The Circuit Court of Appeals of the United States for the Ninth Circuit erred in holding that though the acquisition of the property of the Alice Gold and Silver Mining Company by the Anaconda Copper Mining Company was in violation of the Sherman Anti-trust act the complainants could not avail themselves in this suit of such fact.

II.

Said Court erred in holding that the complainants could not be heard to assert or contend that the transfer of the property of the Alice Gold and Silver Mining Compan · to the Anaconda Copper Mining Company referred to in .he bill was made in violation of the Sherman Anti-trust act.

III.

Said Court erred in holding in effect that the transfer of the property of the Alice Gold and Silver Mining Company to the Anaconda Copper Mining Company and the deed evidencing the same referred to in the bill were not made in violation of the Sherman anti-trust act.

IV.

Said Court erred in holding that a majority of the stockholders of the Alice Gold and Silver Mining Company as against the dissenting complainants, being stockholders, through its board of directors or otherwise, or that any number of stockholders as against any dissenting stockholders, might make a valid transfer of all the property of that company.

V.

Said Court erred in holding that the transfer of all the property of the Alice Gold and Silver Mining Company, despite the protest or dissent or without the concurrence of complainants, to the Anaconda Copper Mining Company or to any transferee is authorized as to them by the laws of the State of Utah.

VI.

Said Court erred in holding that the Utah statute of 1905 referred to in the opinion herein by Ross, Circuit Judge, authorized the board of directors of the Alice Gold and Silver Mining Company with the consent of the majority of the stockholders to sell and dispose of all the property of that corporation, as against dissenting stockholders.

VII.

Said Court erred in holding that the said statute, as against the complainants being stockholders of the Alice Gold and Silver Mining Company, a corporation of the said State of Utah in existence prior to the enactment of said statute, is not in contravention of the Constitution of the United States in the provision thereof which forbids any State to pass any law impairing the obligation of contracts, and it was error not to hold that such statute is, as against the complainants, violative of such provision of the Constitution of the United States.

VIII.

Said Court erred in holding that it was not ruled in the Supreme Court of Utah in the case of Garey *v.* St. Joe Mining Company (32 Utah, 497; 91 Pac., 369), that if such statute in terms authorizes such transfer it is violative

of the said provision of the Constitution of the United States, and said Court erred in not holding that it was decided in said case that the statute, if it authorizes such transfer, is so violative of such provision.

IX.

Said Court erred in not finding that the Alice Gold and Silver Mining Company had no power or authority to take, receive or hold stock of the Anaconda Copper Mining Company or any other corporation, or to receive or hold the stock of said last mentioned company transferred to it as recited in the bill of complaint.

X.

Said Court erred in not finding that there was no purpose entertained by the Alice Gold and Silver Mining Company at the time it acquired the stock of the Anaconda Copper Mining Company as recited in the bill, whatever purpose may have been in the minds of some of its directors or stockholders, to apportion such stock among its stockholders, or the cash value of the share of any stockholder preferring cash, or to wind up the business or disincorporate the company.

XI.

Said Court erred (in view of its finding that the price paid by the Anaconda Copper Mining Company for the property of the Alice Gold and Silver Mining Company was inadequate, that information in the possession of the purchaser affecting the value of the property was not disclosed to the stockholders of the selling company, and that the burden resting upon the first above mentioned company and the defendants to show that an adequate price had been paid and that the sale was a fair one had not been met), in

not holding that the sale and transfer and the deed evidencing the same referred to in the bill each is void.

XII.

Said Court erred in not holding that the transfer of the property of the Alice Gold and Silver Mining Company to the Anaconda Copper Mining Company and the deed evidencing the same, attacked by the bill, each is void:

(1) Because the same was made in violation of the Sherman Anti-trust act.

(2) Because the Alice Gold and Silver Mining Company had no power to dispose of all of its property as against the complainants or any of them without their consent.

(3) Because of the relations subsisting between those controlling the affairs of the Alice Gold and Silver Mining Company and the affairs of the Anaconda Copper Mining Company, they being substantially the same persons, a valid purchase could not be made by the last named company except on full disclosure, neither was the price paid adequate, and because the burden was upon the said last named company to establish in this suit full disclosure and the payment of an adequate price, and neither fact was established by the evidence.

(4) Because the transfer and deed assailed by the bill were each made in violation of the Sherman Anti-trust act.

XIII.

Said Court erred in not entering, or directing to be entered, a decree annulling the deed referred to in the bill of complaint transferring the property of the Alice Gold and Silver Mining Company upon the return by, and directing the return by the Alice Gold and Silver Mining Company

to the Anaconda Copper Mining Company of the stock received in payment for such property together with the accrued dividends thereon.

XIV.

Said Court erred in holding that the decree entered in the trial court was justified or required by the decision of the Supreme Court of the United States in the case of Mason *v.* Pewabic Mining Company, 133 U. S., 50.

XV.

Said Court erred in affirming the decree of the United States District Court for the District of Montana, which decree was erroneous for the reasons assigned in the Assignment of Errors in the appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, which assignment is hereby, by this reference made a part of this assignment on appeal to the Supreme Court of the United States.

III. ARGUMENT.

I. Introductory.

For reasons heretofore adverted to, both the District Court and the Circuit Court of Appeals held that the burden was on the Anaconda Company to prove that the consideration paid by it was adequate and that it had not done so; in other words, the consideration for the transfer was inadequate.

Under settled rules that finding will stand in this court unless it is plainly against the weight of the evidence. If it is adhered to and the court should adopt the view

of Judge Ross that the decree can not be justified by the decision in Mason *v.* Pewabic Mining Company, it will not be necessary for it to inquire further; a reversal will follow, with directions for the entry of a decree annulling the sale. Should the court conclude, however, that the case of Mason *v.* Pewabic Mining Company would otherwise be applicable, it will be necessary to inquire—

(1) As to whether the majority of the Alice stockholders were entitled to make a sale of *all* of its property.

(2) That question being determined in the affirmative, whether the Alice Company had the right to acquire and hold 30,000 shares of Anaconda stock.

(3) That question being determined in the affirmative, whether dissenting stockholders may, in this action, be heard to maintain that the transfer is in violation of the Sherman act and whether it is so violative.

A negative answer to either of the first two inquiries, or an affirmative answer to the last, will require a reversal of the decree appealed from.

It seems appropriate accordingly first to direct the attention of the court to the case of Mason *v.* Pewabic Mining Company.

A decree was entered in that case in the Circuit Court from which it came to this court, substantially like that found in the record herein.

At the outset attention is invited to the fact that in the aspect in which it is considered applicable here, the decree in that case never had the approval of this court. It expresses the views of the circuit judge before whom the cause was tried and that judge alone.

In that case the charter of a corporation had expired and under the law the former directors had become trustees whose duty it was, as such, to sell off the property of the corporation, reduce it to cash with all reasonable expedition and distribute the avails among its stockholders.

This principle is referred to in the opinion of Mr. Justice Miller in the case.

Instead of discharging this duty the directors continued to carry on the business of the company for a year and then a meeting of the stockholders, held as though the corporation were a living thing, in form empowered the directors to transfer the property of the defunct corporation to a new company for stock therein, the resolution directing the transfer containing a proviso that in case a stockholder should not take stock of the new corporation he was to receive his pro rata share in money. "The bill," to quote from opinion, "prayed for the appointment of a receiver to take charge of the effects of the Pewabic Mining Company, that they might be sold, the debts of the company paid, and the remainder of the proceeds distributed among the stockholders."

133 U. S., 53.

The directors, as trustees, having failed to perform their duty, it was asked that a receiver be appointed by the court through whom it could be done. The defendant trustees, on behalf of a company organized to take over the property of the old corporation, offered to award to the dissenting stockholders their proportionate share of the stock of the new company or to pay them for it on the basis of $50,000 for the entire property. At the hearing the directors whose disposition of the property was challenged conceded it to be worth $75,000, the master found it to be of the value of $498,412.24, and it actually brought $710,000 at the sale ordered, as will appear from the report of the case on a second appeal in

145 U. S., 349-361.

The contentions of the parties are thus stated in the opinion in this court on the second appeal:

"The minority appealed to the courts, and there the litigation was carried on for years; the minority insisting upon a sale, the majority upon the transfer of the property to a new corporation."
145 U. S., 356.

The decree ordered a sale, as prayed, but directed that in case no bid in excess of $50,000 should be received, the resolution referred to should be carried out and payment made to complainants on the basis of $50,000 as the value of the company's property. The complainants got more than they asked. They asked a sale, they got it, and they got it with a guarantee that in no event should they realize on their stock on a basis of less than $50,000 as the value of the property of the company. The defendants were continuing their offer to pay on that basis. The decree practically ordered a sale with an upset price.

Whether the trial court was justified in giving to the complainants the guarantee which the decree accorded them, did not become the subject of review. Obviously it was to the interest of the complainants to have the protection it gave them, and though they appealed from the decree, averring error in the refusal of the court to give them an accounting, they made no complaint of the proviso referred to. The defendants appealed from the decree and complained of that part which ordered a sale, but made no complaint of that part which operated to confirm the proceedings they had taken if no bid in excess of $50,000 should be received.

Because at the sale, the property brought a sum vastly greater than $50,000, the complainants had no occasion to object to that part of the decree which provided that the sale should stand confirmed if the property did not bring in excess of $50,000. The defendants could not complain of that part of the decree because, so far as it went to con-

firm the sale, it was in accordance with their demands. They were objecting to the public sale provision and demanding that the transfer stand.

If the case of Mason *v.* Pewabic Mining Company is to be followed it must be because the reasoning under which the Circuit Court reached the conclusion it did is now approved, not because of any principle announced in the case in this court.

Dismissing altogether the contention here made that the Alice could not become the holder of Anaconda stock and that the transfer was made in contravention of the Sherman act, the essential difference between the two cases lies in the fact that the Pewabic Company had been dissolved by operation of law and the court *had* to order a sale. This distinguishing feature is referred to in some comment on the case in

4 Thompson on Corporations (2d Ed.), 4613.

The report of the Pewabic Mining Company case affords no clue to the course of the thought of the circuit judge leading him to direct that the sale attacked in that case should stand confirmed if no more than $50,000 should be received, the dissenting stockholders to have the privilege of receiving from the purchasing company their pro rata share of that sum, in lieu of stock in the new company. Judge Ross comments on the like feature of the decree in the instant case thus:

> "How a sale of all of the property of a private corporation, for an inadequate price and which is otherwise unfair and wholly illegal, made by its board of directors with the consent of a majority of the stockholders but in spite of the dissent of a minority of them, can be subsequently rendered legal by offering the property at public sale to see if at such sale it will bring more, I am unable to understand."
>
> Record, Vol. II, page 1010.

In the Pewabic Company case, the directors, as stated, *were obliged* under the law to make a sale—to reduce the assets of the company to cash—it having expired by limitation of law. In the case before us neither the directors nor the stockholders *were obliged* to make a sale, though it be admitted, as the court held, they *had a right* to make a sale of all the company's assets. The appellants dispute that they were entitled under the circumstances to make a sale of all the company's assets. But waiving that contention and conceding they had the *right* to make a sale, they were under no *obligation*, as were the directors in the Pewabic case, to sell. Being at liberty to sell or not to sell they had the right to declare the terms and conditions under which they would sell. They did so. They agreed to sell for 30,000 shares of the stock of the Anaconda Company. They did not agree that the property might be sold at public auction, to go to the Anaconda Company only if it should be the highest bidder, but for 20,000 shares of the stock of that company if no bid should be received in excess of $1,500,000.

The gentlemen who engineered the transaction never thought of proposing to the stockholders of the Alice the disposition of its property on any such basis. It was evident that those in control of the Anaconda wanted this property for that company. They gave no evidence of being simply desirous of disposing of it that those in such friendly relations with them, the stockholders of the Butte Coalition, or any other stockholders of the Alice, might get the benefit of the bargain being offered. They wanted the property. Successful bidders would have thwarted their purposes and their plans.

The decree directed a method of disposition of the property to which neither the Alice nor any of its stockholders ever assented and in respect to which there never was any corporate action whatever. The court certainly has no

power to dispose of the Alice property according to its plan because it can not sanction the method by which it was disposed of through action formally taken at a meeting of its directors, in form ratified at a meeting of its stockholders. It was never proposed by anyone to a meeting of the Alice stockholders, that the property be put up and sold to the highest bidder, and certainly the property of a company still in being, can not be sold without a vote of the stockholders regularly assembled. Nor was it proposed that the property be sold to the Anaconda Company for 30,000 shares of its stock unless at a public auction some one should bid more than $1,500,000, the value of such stock. The Anaconda never offered to take the property on such terms. For reasons advanced heretofore, it had no disposition to let the property get away from it by inviting a free and open competition. It did not do so when it sought to invest itself with the title to the Boston & Montana properties, or those of the Parrot or of the Red Metals Company, or any of the other constituent companies of the Amalgamated. By that plan the properties which the Amalgamated had been at such pains and at such cost to unite in one control might have passed into the control of sundry individuals or corporations, restoring the condition that prevailed prior to 1899.

It was not in its plans to invite or permit any such contingency, so it submitted to none of the companies a proposition to give a certain number of shares of its stock should they respectively not realize a sum greater than the value thereof at an auction sale to be held. Certainly it neither dealt nor offered to deal on any such basis with the Alice and its stockholders. The court made a contract for the parties which neither of them ever assented to.

The learned judges joining in the majority opinion offer no reason for departing from the usual course of annulling a sale found to have been made upon an inadequate consideration, the burden being upon the purchaser, owing to the at-

tendant circumstances, to show full value paid. They seem to have believed they were following a rule laid down by this court or at least a precedent which had its express approval.

The judge of the district court, a jurist of ability, ruled that the dissenting stockholders had a right to have the value of the property subjected to the "acid test," as he expressed it, of a public sale. The decree went, accordingly, that the property should be offered at public sale and should stand, as stated, or be set aside, as thereat the property did or did not produce more than the value of the stock given for it by the Anaconda, found to be million and a half.

His idea apparently was that the appellees having failed *at the trial* to establish that the consideration paid was adequate, the question should be tried out by the test of a sale.

A sale at public auction is not an "acid test" of value at all. Indeed it is no test. It is so far from being a test that many courts have refused even to permit evidence of what property brought at a judicial sale at public auction to be admitted in proof of value.

Those which countenance admission of testimony of that character refer disparagingly to it as being *some* evidence of value.

The Supreme Court of New Jersey said in

Martinett *v.* Maczkewez, 35 Atl., 662:

> "In inquiries of this nature it has been customary to show the market value of the property if it has a fixed rate of that kind, and, if it has no such estimation, to prove its value by the opinion of experts, and by an exposition of the state and condition of the things sold. In such an inquisition the price obtained at a sheriff's sale would seem to be wholly valueless. When a willing seller and a willing buyer agree and fix the price of an article, it is obvious that it is reasonable to infer that such estimation approximates closely to the real value of such article; but in an official sale by auction the

> owner has no voice in the affair, and each bidder is striving to obtain the thing sold, not at its actual worth, but at a bargain. It is vain to deny, for all experience attests the fact, that, as a general thing, the attendants at a public auction of personal property are there with the expectation of acquiring the articles purchased much below their cost in the market, and it is deemed that, as criteria of real value, such transactions can have no effect except to mislead."

The rule thus announced was applied in

In re McAusland, 235 Fed., 173, 189-190.

In the opinion of the Court of Civil Appeals of Texas, prices realized at forced sales possess but slight evidentiary weight.

Rickards & Co., *v.* Bemis & Co., 78 S. W., 239.

The market value of property and what it will bring at a forced sale are two quite different things.

Street Ry. Co., *v.* Walsh, 94 S. W., 860.

It would unquestionably be error for a court to instruct a jury that the value of property is what it would bring at a judicial auction sale.

The desperate debtor begs for an opportunity to sell off his property at a private sale to satisfy his obligations rather than to have it disposed of under the hammer, long experience and obvious reasons convincing even the dullest minds and the least sagacious intellects that the full value is rarely, if ever, realized at such a sale. It is ventured that in all the history of equity jurisprudence in this country, or in England, no similar decree can be found in which the court, having held that a sale was made upon an inadequate consideration, the circumstances being such as to impose upon the purchasers the burden of proving adequacy, ordered an auction sale at an upset price, being that paid on the sale held to be fraudulent.

The term is used in no opprobrious sense, as indicating a deliberate purpose to wrong. Reference is made to that class of sales denounced by the courts because of the relation subsisting between the buyer and the seller in consequence of which the law casts upon the former the burden of proving that full value was given. In many, if not most such cases, the wronged suitor is impecunious. He might as well submit in silence if all he can hope for is that his property will, if he succeeds, only be offered for sale at public vendue to the highest bidder.

The appellants in this case were utterly unable to bid, themselves, upon this property. They had not the means to enter the competition. A sale of mining property at public auction, because of the difficulty of arriving at its intrinsic value, would probably result in a greater proportionate loss to the owners than almost any other kind. Bidders who would be obliged to go to at least $1,500,000 would not be numerous under any circumstances. The Anaconda had accurate and reliable information concerning the property in question and the surrounding country. It could explore and operate the Alice ground at less risk and cost than any one else. Mr. Gillie testified, as must be obvious, that the ground is worth more to the Anaconda than to any one else. With its corps of chemists and metallurgists, its smelters with their laboratories, it could work out at a minimum cost of the problem of treating the refractory zinc ores. It could penetrate the old workings by either drifts or crosscuts, from the Moose shaft or the Badger State shaft. Why should any bidder appear to compete with it at the auction sale ordered? Every one who had $2,000,000 or thereabouts, for so much it took, which he was willing to invest in a non-producing mining property, knew in advance that the Anaconda could afford and could well afford to give just a little more than he was justified in offering for the property, and in all probability would raise

his bid. He would have some chance if the sale should be made upon sealed bids instead of at public auction. The appellants asked that the sale be made upon sealed bids, but their request was refused, perhaps properly in view of the Federal statute on judicial sales.

Moreover a prospective bidder would recognize that should he be successful an appeal would, in all probability, be taken by the appellees from the decree through the intermediate appellate court to this court, with a possibility of a reversal. Meanwhile, he could not prudently make expenditures for the development of the property, and nearly $2,000,000 of his capital would be tied up for two years, certainly, and possibly for as many as four. It should be stated that the upset price was fixed at $1,500,000 with the amount of the dividends which the Alice had been paid on the Anaconda stock, and other items aggregating almost the great sum last above named.

No one could successfully bid against the Anaconda and no one appeared to bid. The reason given is not the only one that would naturally deter bidders. The newcomers would have been regarded as interlopers in the camp. Few people would care to invest $2,000,000 in mining property in Butte and so much more as might be required to develop it, the property having been wrested from the Anaconda in a lawsuit. The conditions were not such as to invite bidders. The event was what might have been anticipated. The decree held the word of promise to the ear, but broke it to the hope.

Judge Ross declined to accept the view that the value of the property would be conclusively determined by an auction sale, saying:

> "In the present case there was no bidder at all — thus, according to the decision of a majority of this court, there was rendered legal and valid the sale and conveyance of the entire property of an existing cor-

poration, which sale and conveyance it was found and adjudged by the court below, and is found and adjudged by this court, were at the time they were made unfair and wholly illegal."

Record, Vol. II, page 1010.

Mason *v.* Pewabic is inapplicable to the case before the Court, but if it were otherwise controlling, it would still be incumbent to inquire whether the majority stockholders of the Alice were at liberty to sell *all* its assets, whether that corporation was empowered to take and hold Anaconda stock, whether the appellants may contend that the sale or exchange under review violates the Sherman act, and whether it was, in fact, made in contravention of the statute. These questions are now examined.

II. Is the Sale of All the Alice Property Justifiable?

Confessedly the rule at common law is that neither the directors nor any number of stockholders less than all have any power to dispose of all of the property of a corporation.

> Forrester *v.* B. & M. Co., 21 Mont., 544.
> III Thompson's Com. on Corp., 2421.
> VII Thompson's Com. on Corp., 8356.
> Noyes on Intercorporate Relations, secs. 114, 281.

The rule as stated in these authorities is, as it is understood, admitted by the appellees, and the appellants, upon their part, admit that it is within the power of the directors and a majority of the stockholders of an insolvent corporation or a corporation in danger of insolvency to convert all of its property into cash, with a view to the division of the remainder among the stockholders and the dissolu-

tion of the company; in other words, a sale of all of the property of a corporation that is insolvent or threatened with insolvency may be made as an incident to the winding up of its business. The conditions authorizing the sale can be gathered from the following quoted in the opinion in the Forrester case from that filed in *Treadwell v. Manufacturing Co.*, 7 Gray, 393, to wit:

> "Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders, for the sale of the corporate property, and the closing of the business of the corporation, was justified by the condition of their affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable. Under these circumstances, it was in furtherance of the purposes of the corporation to pay their debts, close their affairs, and settle with their stockholders on terms most advantageous to them."

It will be noted that in that case the corporation was without capital and *without the means of procuring it*, and the concluding paragraph shows the purposes for which the sale is authorized. With reference to that case, after quoting as above, the Montana court, speaking through Mr. Justice Pigott, says:

> "In that case, as in *every one cited by the defendants*, the corporation was unable further to prosecute the purposes for which it was created."

But in this connection a distinction must be drawn between a losing corporation and one that is insolvent or threatened with insolvency. The bare fact that in the way the business of the company has been conducted it does not produce a profit, does not justify the majority of the stock-

holders in abandoning the purpose for which the corporation was organized and winding it up.

Noyes on Intercorporate Relations, sec.112.

The following quotation is made from the opinion in a recent case:

Butler *v.* New Keystone Copper Co., 93 Atl., 380-383,

namely:

> "If the business be unprofitable and the enterprise hopeless, the holders of a majority of the stock may, even against the dissent of the minority, sell all the property of the company *with a view to winding up the corporate affairs.* Cook on Corp. (6th ed.), 670; Thompson on Corp. (2d ed.), 2421, 2424. See note in 35 L. R. A. (N. S.), 396, where many cases are collected."

Repeated assertions were made in the argument before the trial court that the property of the Alice Company was practically worked out, that it was neglected and allowed to go to ruin, and that it was practically abandoned by its owners as well nigh worthless; that the company was in debt for the care of the property to an amount aggregating $34,000 or thereabouts, and that it was without means to discharge its obligations; but neither the evidence supposed to give foundation for these comments, nor the comments themselves, can obscure or disguise the fact that the appellee Anaconda Copper Mining Company gave for the property what the appellants aver was the equivalent of $1,200,000, and which the appellees themselves assert was worth $1,500,000. It can scarcely be said that a company having property worth from $1,250,000 to $1,500,000, and owing $34,000 is either insolvent or in danger of insolvency.

The contention made by appellees in this behalf was not urged with the fullness before Judge Bourquin with which it was made before Judge Hunt, who dismissed it as quite untenable. After reviewing the history of the property, he said in the course of his opinion:

> "It cannot be said that the Alice Mining Company was insolvent, though it appears to have been a losing corporation. However, no effort, other than the sale under investigation, appears to have been made to sell the property or to finance the company so that it could operate, or to dismiss the debt of $34,000 due to the Butte Coalition Company, nor is there anything to show that the Butte Coalition Company was seeking to collect the debt. The property seems purposely to have been kept idle for years past. Nor does it appear that efforts to exploit the property were recently made. Surely a property which sold for the equivalent of $1,300,000 would have had little or no difficulty in raising $34,000 due to another corporation.
>
> Record, Vol. I, page 170.

In this connection, however, the attention of the court may be directed to two pertinent items of evidence in the record.

First. It is not even intimated in the circular sent to the stockholders asking ratification of the sale which the directors had already agreed upon that the company was either insolvent or in danger of insolvency, nor was it suggested that the sale was necessary because of such condition. The mind must be closed to the perfectly obvious facts of the case to indulge in any such assumption. Reference was indeed made to the balance sheet made part of the circular which showed an outstanding indebtedness, trifling in amount, however, as pointed out by Judge Hunt, in compari-

son with the conceded value of the property, but it was not even suggested that the creditor—which, by the way, was the Butte Coalition, the largest stockholder—was importunately demanding liquidation or that even a request for payment had been made. The transfer was recommended because machinery and equipment were required to do development work and to treat the ores which the prospective purchaser was able to supply and which the Alice Company could not provide for want of means. The conveyance was further recommended because like action had been taken by a large number of other companies referred to in the circular and the hope was held out that the stock of the Anaconda, so well able to make the expenditures necessary to the economical working of the property and the reduction of the ores which might be extracted from it, would prove much more remunerative than the property had been or would be likely to be if it continued in the ownership of the Alice.

Second. The testimony of Mr. C. F. Kelley forbids the belief that the property was sold either because it had not paid or because the company was unable to meet its obligations. A plan was formed, by whom it is now immaterial to inquire, to consolidate the properties of the Amalgamated companies. It apparently embraced those of the Red Metals Company, whose stock was owned by the Butte Coalition, but did not include the Alice. It was a part of the plan, it is now asserted, to dissolve the various companies, but the Butte Coalition owned the major part of the stock of the Alice, and it became necessary to widen the scope of the consolidation plan to take in the latter that the Butte Coalition might be dissolved when the Anaconda stock should be distributed.

Record, Vol. II, page 852.

Mr. Ryan tells tersely the story in this sentence:

> "The Alice property was bought at that time simply because this other consolidation plan was going through and the Alice Company was without means to develop its own property and I was anxious to have the Anaconda take it over and enter upon its development."
>
> Record, Vol. I, page 405.

That was why the transaction was entered upon—the distressed financial condition of the Alice is an after-thought urged because of what seems the legal necessities of the case.

When the Ryan option on the Walker stock was taken up, the indebtedness of the Alice amounted to about $27,000, which probably included the cost of the construction of a new hoist after the destruction of the old one by the fire. The new owners increased the debt somewhat more rapidly, incurring nearly $2,000 of it for expenses of the eastern office, the necessity for which is not made obvious by the testimony, but the aggregate was inconsequential and the Butte Coalition appeared to be carrying the load without any complaint, as the Walkers had done when they were in control.

If, however, the affairs of a corporation get into such condition as that a sale of all of its property is justified, that sale must be made *for a pecuniary consideration*, as a step towards the liquidation of the company. Noyes says:

> *"Transfer of Entire Corporate Property Without Unanimous Consent Requires Monetary Consideration.*—Upon the winding up of the affairs of a corporation, every stockholder has a right to insist that the property of the corporation be converted into money and that the proceeds be distributed. He has a right to require the valuation of the corporate property to be fixed by a sale.

> "Similarly, it is the right of every stockholder to demand that sales of corporate assets made preliminary to, and for the purposes of, liquidation shall be for money. He cannot be compelled to accept 'chips and whetstones' instead of cash. Whether the exchange of one species of property for another is even a step towards liquidation depends entirely upon their comparative marketableness. An exchange is not a sale."
>
> Noyes on Intercorporate Relations, 118.

The learned trial judge tersely expressed at the hearing the rule in these words, "The corporation can sell, but it cannot swap."

This doctrine was announced in substance in the Forrester case.

As indicated above, the court recognized that a sale of all of the property of the corporation might be made, its language being as follows:

> "As we have said, at common law, the directors (at least with the consent of the majority of shares) may sell the entire corporate property *when the exigencies of a waning business require such action*,"

but this does not justify anything but a sale, and, accordingly, the court refused to recognize the validity of a transfer in exchange for stock of another company. Touching that feature of the case, the opinion says:

> "Manifestly the transfer proposed lacks an element necessary to constitute a sale, namely, a pecuniary consideration. To constitute a sale there must, as a general rule, be a consideration in money."

This whole subject of the right of a corporation to transfer all of its assets is the subject of an extensive note to the case of

> Tanner v. Lindell Ry. Co., 103 Am. St., 548,

to which the court is respectfully referred.

It is argued, however, that the sale of *all* the property of the corporation is justifiable under a doctrine asserted in certain cases of which

Lang *v.* Reservation M. & S. Co., 93 Pac., 208,

may be considered as representative. With it is grouped

Traer *v.* Lucas Prospecting Co., 99 N. W., 890.

This last-mentioned case is invariably mentioned in support of the general proposition asserted by some courts that the right to sell all the property of a corporation exists notwithstanding the protest of minority stockholders. It does not stand for the non-existence of such right except in exceptional circumstances. The general rule is against the doctrine of that case. Judge Pigott says in the Forrester case that there is no conflict in the decisions, that they all recognize the general principle that the assent of all stockholders is necessary to a sale of *all* the property of the corporation. His language is—

> "Our attention is called to certain decisions which are said to recognize a contrary doctrine, but examination discloses no conflict of opinion among the courts of last resort."

And then, after referring by way of example to Treadwell *v.* Manufacturing Co., 7 Gray, 393 (a case by the way made the subject of comment in the brief of defendants below), he adds,

> "In that case, as in every one cited by the defendants, the corporation was unable farther to prosecute the purposes for which it was created."

He was not justified in saying there is "*no* conflict, etc." Some few courts, it must be admitted, have announced the existence of a general power though in all of them, perhaps, insolvency in fact, existed, so that the judgment was right though the reasoning was wrong.

It is worthy of note that Judge Hunt, as Associate Justice of the Supreme Court of Montana, concurred in the opinion in the Forrester case and it may be remarked that the opinion filed by him herein discloses that he did not tolerate the idea that the present case fell without the general rule announced by Judge Pigott.

But in practically every collection of cases dealing with the subject, notes, text-book declarations, etc., Traer *v.* Lucas is cited as announcing a doctrine opposed to that supported in the Forrester case.

The Lang case may be profitably considered. In line with it is a later case in the Supreme Court of Washington,

Smith *v.* Flathead River Coal Co., 119 Pac., 858.

In both of these cases the corporation had been reduced to such circumstances as justified a sale to save something out of the wreck of a business. But the articles in each case conferred not only the common-law powers of purchase and sale that attach to any business corporation, but also the right to "*deal*" in mines and mining property. The Alice Company was invested with no such power by its articles. In view of that provision in its charter, the court said of the corporation whose acts were considered in the case last-above cited:

> "It was a speculating and prospecting corporation, etc."

If it was given power to operate mines, it was likewise given power by the significant word referred to, which the

court does not omit to quote from the articles in each of the cases, to engage in the business of buying and selling mines. In Smith *v.* Flathead, it is said,

> "There is no showing that the sale disrupts the corporation or that *the proceeds will not be invested in other enterprises* consistent with the articles of incorporation."

And in the Lang case occurs this language:

> "In the case before us the sale does not disrupt the corporation, nor is it contrary to the purposes for which the corporation was formed. On the contrary the corporation will be in as good a condition to proceed with the objects it was formed to promote after the sale as it was before."

In other words, it was held that the company being formed to "deal" in mining property might sell out its holdings with a purpose to invest the avails or such part of it as did not represent profits, in other similar property, likely to undergo the same transmutation. That is the very heart of the problem. The authorities deny the right generally to sell *all* the property of a corporation, because to do so would not be in accordance with any purpose for which the company was created, but would operate to disable it, so that it could not carry out the purpose for which it was created.

Even a right to "deal" in mining property, however, would seem scarcely to authorize a sale of all property including office furniture, bills receivable, etc., etc.

The Alice Company had, as stated, no power to "deal" in mining property. The adventurers who organized it limited its powers within relatively narrow bounds. It was in no sense "a speculating and prospecting company." It had, indeed, "power to buy, sell, lease, hold, own, and operate mines." Undoubtedly the Boston and Montana Company,

whose right to dispose of all of its property without the consent of all of its stockholders was denied in the Forrester case, was invested by its articles with like power. The opinion does not disclose and the writer has not access to the record to determine. It would be strange if a mining company should be organized under articles not expressly conferring such power. But it is immaterial whether the power was or was not expressed in so many words in the articles. It existed, nevertheless, a necessary incident of almost any conceivable purpose that may have been expressed in the articles. The power to acquire property necessary or proper to the conduct of the business for which a corporation is created and the power to sell and dispose of the same exists at the common law.

7 Am. & Eng. Ency., 734.

A like power must have existed in every case that ever announced the doctrine that a corporation cannot sell *all* its property without the consent of all its stockholders.

The rule relied upon by appellants was appealed to in

Keane *v.* Johnson, 9 N. J. Eq., 401,

but it was said in opposition that it could not be applied because the charter in that case expressly conferred upon the corporation the power of "purchasing, holding, and *conveying* any lands, tenements, etc." Touching this contention the court said:

> "Now it is argued that the company have by this language the power to convey away all they have the power to purchase and to hold. The argument seems to me more plausible than sound."

And then the chancellor added that the langauge permitted land to be conveyed—

"when it is necessary or expedient to the objects of the incorporation that it should convey any particular property."

"So that," he declared, "it is only when the objects of the corporation require it that any lawful conveyance can be made."

The Utah Statute.—Reliance is placed, however, upon a statute of the State of Utah enacted in the year 1905, providing that:

"The corporation in its name shall have power to make all contracts necessary and proper to effect its purposes and conduct its authorized business; to sue and be sued; to have a seal, which it may alter at pleasure; to buy, use, mortgage, sell, or otherwise dispose of personal property; to buy, receive, use, sell, mortgage, lease or bond, or otherwise dispose of all such real estate as may be necessary, useful, or desirable for it to own, use, or dispose of for all its purposes. Such corporation shall have the right to disburse out of its profits actually earned and on hand such dividends, from time to time, as the directors may deem prudent. It may make all such by-laws, rules, regulations, not inconsistent with law or with other corporate rights and vested privileges, as may be necessary to carry into effect the object of the association, and such by-laws, rules, and regulations may be made in a general meeting of the stockholders or by the board of directors. And any corporation now existing, or that hereafter may be organized under the laws of this State for the purpose of mining, or the exploration or development of mining property, including lands bearing metal, stones, limestone, oil, petroleum, asphalt, and other hydrocarbons, shall, in addition to the powers above enumerated, have the power to purchase, take or bond or lease, or in exchange, or locate, or otherwise acquire any lands, mines, options, territory, fields, or claims, and to sell, convey, lease, bond, mortgage, dispose of or other-

wise deal in the same to such extent as the board of directors may deem prudent subject always to the provisions of the articles of incorporation and by-laws; *provided*, that in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the board of directors shall not be valid or binding on the corporation until confirmed by a vote of a majority in amount of the stock outstanding at a meeting of the stockholders duly called to consider such action of the board. When the articles of association provide that the property of the corporation may be sold, mortgaged, or otherwise disposed of by the directors or by the stockholders, sales made in accordance therewith shall be binding on the company."

If the act authorized in terms the transaction in question, the interesting inquiry would be presented, to be followed later, as to whether this law can constitutionally be held to apply so as to affect the relations of stockholders *inter sese* in the case of a corporation organized years before it came into existence. But does it purport to permit an exchange of *all* the property of a mining corporation for capital stock of another?

Reference has been made above to authorities holding that even the most general language in a charter authorizing a corporation to buy and sell lands is to be construed as authorizing not the sale of all the property of a company without which it can do no business, and for the purpose of putting it out of business, but only to sell from time to time such part of its real estate as is not necessary in the conduct of its business, or, perhaps, that can be disposed of with advantage, the proceeds to be invested in other more fit or equally fit. In other words, such a provision authorizes a sale in the course of the regular business of the corporation, not a sale intended to close up the business of the corporation.

See Keane *v.* Johnson, *supra*.

Indeed such is the very language of the statute which authorizes the corporation to sell or otherwise dispose of its property "for all its purposes," as recited in its articles.

In Forrester *v.* B. & M. Co., the court pointed out that even a general power to buy, sell or exchange property would not authorize an exchange of all property of a corporation for stock of another.

Forrester *v.* B. & M. Co., 21 Mont., 562-563.

The statute ought to have a construction in conformity with this principle. It ought to be held to mean that in the case of a mining company, specifically referred to in the act, whose articles do not authorize a sale, etc., the consent of the stockholders as provided therein must be secured; in the case of those whose articles disclose it to have such power, the board of directors may dispose of its property in the regular course of its business without submitting the question to a vote of the stockholders.

But quite aside from that question the statute does not authorize the transaction under consideration because it is not a sale, as said by Judge Bourquin, but a "swap." A swap for stock of another corporation, which the Alice had no power to take, either, under the statute. And even if the statute permitted a corporation to hold stock of another corporation, the articles of the Alice did not authorize the acquisition by it of property of that character. Both the law and the charter of the Alice forbid its acquiring stock of the Anaconda.

By the act in question corporations generally are empowered to make all contracts necessary and proper to effect their purposes and conduct their authorized business (not contracts to put them out of business); to sue and be sued; to have a seal, which they may alter at pleasure, to buy, receive, use, sell, mortgage, lease or bond or otherwise dispose of all such real estate as may be necessary, useful, or

desirable for them to own, use, or dispose of for their purposes. And a mining corporation is further given "the power to purchase, take on bond or lease, *or in exchange*, or locate or otherwise acquire any *lands, mines, options, territory, fields* or *claims*, and to sell, convey, lease, bond, mortgage, dispose of, or otherwise deal in the same to such extent as the board of directors may deem prudent, etc."

It may take *mines, options, territory, fields*, or *claims* by purchase or exchange. *Stock of another corporation is excluded* by necessary inference. *Expressio unius est exclusio alterius.*

It is elementary law in America that one corporation cannot hold the stock of another unless expressly authorized by statute so to do.

But the Forrester case above referred to goes further and declares that waiving the question of the right of a company to sell or otherwise dispose of all of its property by one transaction, it is a change of corporate habitation that was accomplished, that there was neither a sale nor an exchange in any just or legal sense. The transaction being investigated was identical with that considered in the Forrester case. The court said, and the language is entirely appropriate as applied to the facts of this case:

> "A stockholder, we think, may not be compelled to take, in lieu of his stock in a Montana corporation, an equal number of shares in the New York corporation, or the value of those shares; nor can he be compelled to accept payment for his shares in any other way than that prescribed by the Montana statute on a dissolution of the Montana corporation."

This comment by the court is sufficient answer to the claim that the transfer was made as a step in the liquidation and dissolution of the company. It accords with views expressed in

Morris *v.* Elyton, 125 Ala., 263,

which deserves to be studied with care in this connection.

Constitutionality of Utah Statute.

But if the statute could be held to extend to a transaction such as that under investigation, it cannot be, consistently with the constitution, held to apply to corporations created before the act went into effect.

In the act under which the Alice Company was incorporated was a provision to the effect that the legislature might at any time modify or repeal it.

Comp. Laws of Utah, 1876, page 232.

On the admission of the State into the Union in 1895, its constitution reserved to the legislature the right to amend or repeal any law governing the charters of corporations.

The contract implied in a corporate charter has a threefold aspect:

(1) It is a contract between the State and the corporation.

(2) It is a contract between the State and the stockholders.

(3) It is a contract among the stockholders *inter sese.*

Somerville *v.* St. Louis, 46 Mont., 268.

The court is familiar in a general way with the controversy which has been waged and the conflict in the decisions as to whether the right thus reserved extends to such changes as disturb the relations of the stockholders among themselves, or whether it was intended only for the protection of the public and is applicable only to such provisions as affect the relations between the corporation and the State.

It is conceded that at the time the Alice was incorporated and down to the time of the passage of the act of 1905, any stockholder might prevent a disposition of all the assets of at least a going, prosperous corporation. Such was the law unquestionably, and that law entered into the contract between the incorporators and their successors in interest—that is to say, that at the time the Alice Company was incorporated, the stockholders entered into what amounted to a contract among themselves that the entire property of the company should not be disposed of except for the purposes of liquidation, in the case of its insolvency, without the consent of every stockholder. The question is presented as to whether it is within the power of the legislature thus to modify the contract entered into.

The view contended for by the appellants is upheld powerfully in

3 Clark & Marshall, 631 (*a*), (*b*), (*c*), (*f*).

It will be unnecessary, however, to enter into any discussion of the merits of the conflicting views touching the extent of the reserved right to amend or repeal, or to inquire which is the better grounded in reason or more amply supported by authority. The question is disposed of, for the purposes of this case, by the direct adjudication of the Supreme Court of Utah in favor of the contention last above referred to, namely, that the subsequent legislation authorized must not affect the nature of the contract of the incorporators *inter sese*.

Garey *v.* St. Joe M. Co., 91 Pac., 369.

In the opinion in that case will be found an exhaustive discussion of the question and of the reasons impelling the court to the conclusion at which it arrived, and to which it adhered upon a motion for a rehearing.

The opposite view was taken by the Supreme Court of Montana in two cases.

Allen *v.* Ajax Mining Co., 30 Mont., 490.
Somerville *v.* St. Louis, 46 Mont., 268.

The Ajax case was affirmed in the Somerville case. The former considered a statute like that of Utah passed in 1905 and here appealed to, authorizing a sale of all the property of a corporation on a vote of two-thirds of the stock. The latter upheld a statute making stock of corporations assessable, there being no law by which an assessment could be levied at the time the organization was effected. It was just such a statute which was considered in Garey *v.* St. Joe Mining Co.

It is not necessary now to inquire into the soundness of the view expressed or the course of reasoning followed in the elaborate opinion of the Utah court. The decision is controlling on this court upon rules thoroughly settled by a long line of cases. It construes and gives effect to the reservation act of 1874, the principle of which is carried into the Utah constitution. It holds that the general language of that act is to be restricted in its significance so as not to include the authority to enact laws which will impose terms upon the stockholders of a corporation *inter sese* other than those of their contract when they embarked upon the enterprise and organized the corporation. The view was expressed that to give the statute a broader interpretation would make it violative of the Constitution of the United States. When the highest court of a State interprets a statute of that State or a provision of its constitution, or when it declares that a statute is void for conflict with the Constitution, that is, has no existence, its decision becomes binding upon all the Federal courts. It is even held that if this court has given an interpretation to a statute, it will, should a later case upon

the statute come before it, conform to a varying construction meanwhile given to it by the State court.

Forsythe *v.* Hammond, 166 U. S., 506.
Louisiana *v.* Pillsbury, 105 U. S., 278-294.

When a State statute was restricted in its application because giving it the broad significance to which the language used might properly extend it would make it unconstitutional, the construction thus given to it by the highest court of the State was held by the Federal court to be conclusive upon the latter.

Chicago *v.* Hackett, 228 U. S., 550.

By virtue of the ruling in Garey *v.* St. Joe M. Co., the statute of 1905 must be held inoperative as against corporations organized prior to its passage, so far as it attempts to authorize a sale of *all* the property of a corporation against the protest of any stockholder.

Moreover it appears palpably to offend against the provision of the constitution of Utah that, with the exception of general appropriation bills and bills for the codification and general revision of laws, "no bill shall be passed containing more than one subject, which shall be clearly expressed in its title."

Sec. 23, Art. VI, Constitution of Utah.

The act in question appears to be a flagrant case of log-rolling legislation. Apparently some members desired to confer upon the directors and a majority of the stockholders the right to which appeal is made here. Some member wanted some change made in reference to the amendment of articles of incorporation. A third wanted an amendment in relation to the consolidation of corporations. A fourth

wanted some legislation in relation to railroad lands, and a fifth desired validate i some acts, presumably void, done by corporations which had attempted to consolidate. They pooled their issues and put through the consolidated measure. All this will appear from the statute as published in the acts of the session of 1905.

In the Revised Statutes of Utah, 1898, a subdivision designated as Title II is devoted to the subject of corporations. Chapter I, under this title, deals with the subject of General Corporations and embraces sections 322, 338, and 340, referred to in the title of the act of 1905, dealing with the subjects, respectively, of the powers of corporations, amendments to articles of incorporation and consolidation of corporations, each respectively preceded by the subheads, "Powers enumerated," "Amendments," "Consolidation."

Chapter II of this title treats of the subject Assessments; III, Bank Corporations and Banks; IV, Building and Loan Associations; V, Insurance Corporations; VI, Loan, Trust and Guaranty Associations, and VII, Railroad Corporations. Section 444, the last of those referred to in the title of the act of 1905, is one of the sections of chapter VII. Besides thus uniting amendments to sections being parts of the chapter on railroad corporations with sections being parts of the chapter on general incorporation, the title gives no kind of intimation that mining corporations are to be invested by the amendment with any powers other or different from those of corporations generally, nor is there any suggestion in the title to the bill, that the right of a stockholder to object to a transfer of all of the propery of the corporation guaranteed to him by the then existing law was to be taken away from him. The title simply apprises the citizen that an amendment is to be made to certain sections of the statutes affecting the powers of corporations. That would be understood by the ordinary reader to refer

to the powers of corporations generally. If an amendment was to be made by which mining corporations were to be granted other or different powers from those conferred upon corporations generally, or if, by the act in question, the directors of mining corporations or a majority of the stockholders thereof were to be invested with powers not to be exercised by other corporations, or the directors or stockholders thereof, plainly the statute should have so stated in order to meet the requirements of the constitution.

III. Has the Alice Gold & Silver Mining Company the Power to Hold Stock of the Anaconda Copper Mining Company?

The general rule of the common law is unquestionably against the right of one corporation to hold stock in another, unless expressly authorized by the law, though the authorities are undoubtedly divided on this question. The rule very generally adhered to was declared in Montana in the case of

MacGinniss *v.* Boston & Montana Mng. Co., 29 Mont., 459.

In the opinion in that case it is said that Iowa and Maryland hold otherwise, the argument being that the power to hold and dispose of property is inherent in a corporation the same as in an individual, and that no express authorization is necessary. The courts holding the contrary doctrine, however, declare that unlike an individual, a corporation has no powers except those conferred upon it by statute, and that unless the right to hold stock in another corporation is expressly conferred it is withheld. Such is the doctrine announced by the Supreme Court of the United States.

Cal. Bank *v.* Kennedy, 167 U. S., 362.

The rule is tersely expressed by Noyes in the following terms:

> "SEC. 264. *Necessity for Statutory Authority to Purchase Stock. Rule in United States.*—The charter of a corporation is the measure of its powers. It can exercise only such powers as are conferred upon it, either in express terms or by necessary implication, in the law of its creation.
>
> "The purchase of stock in another corporation involves a participation in a new and distinct enterprise. A corporation can make such a purchase only when expressly authorized to do so by statute, or when the power can be implied as incidental to the powers specifically granted."

Combining the propositions considered above under subheads 2 and 3, the same author says at section 281, as follows:

> "Upon principles already considered at length, a corporation has no implied power to transfer its entire property to another corporation in exchange for its shares. The acquisition of stock, in such a manner, is *ultra vires* and an infringement upon the rights of dissenting stockholders."

In accordance with the principles laid down in the quotation last above made, it was held in the case of

Elyton Land Co. *v.* Dowdell, 20 So., 981-983,

that even though by its articles a corporation was authorized to "take stock" in other corporations, it was not authorized thereby to effect its own dissolution by a sale of all its assets, taking the stock "of another company in payment for distribution to the stockholders or any shareholder without the consent and contrary to the preference of the shareholder," and, in the course of the opinion, the court

adds: "It may be that a private business corporation may sell out its entire property by and with the consent of less than all its stockholders, for the purposes of paying its debts, or for the purposes of dissolution and settlement; but when this is the purpose, it must be clearly understood, and the terms and conditions of the sale must be within the contractual relation between the corporation and its creditors or shareholders."

In the MacGinnis case, the court found that a Montana mining corporation was not prohibited from acquiring and holding stock in another mining corporation, and that, accordingly, a foreign corporation might hold stock in a Montana corporation. It referred in the course of the opinion to a provision of the statute which authorized the consolidation of mining corporations "in such manner and upon such terms as may be agreed upon by their board of directors," and to another statute, then of recent date, by which corporations were authorized to exchange their property for stock of other corporations. After referring to the consolidation statute, the court said:

> "If such corporations may consolidate in any manner and upon any terms without restriction, they may proceed by conveying all of their property to a corporation organized for that purpose, or by the purchase by one of the companies of stock of the others in whole or in part."

Apparently the court gave no particular consideration to the significance of the word "consolidate" as it appeared in the statute, and we are not prepared to say that such a transaction as it refers to might not be regarded as a consolidation within the meaning of the Montana act. It may be, and frequently is, given so general a significance as to embrace the case of the sale and transfer by one corporation

to another of all of the property of the former. In that case neither of the old corporations go out of existence and no new corporation is organized. This is not, however, the significance ordinarily given to the word "consolidate" in these statutes. The distinction between a sale of all corporate assets and a merger of two or more corporations is pointed out in

4 Clark & Marshall, 335.
4 Cook, sec. 897, page 3293.
Helliwell on Stock, 378.
Lee *v.* Atlantic, 150 Fed., 787.
4 Cook on Corporations, sec. 897, page 3298.
Noyes, 279.
Wm. B. Riker & Son Co. *v.* U. D. Co., 82 Atl., 930.

All of these authorities hold that as the term is ordinarily used in statutes it contemplates the passing out of existence of the old corporations and the organization of a new one, and that such a transaction as is here before the court is not to be regarded as a consolidation at all.

It is expressly stated by Cook that the Federal authorities are in conformity with this view, and he quotes from an opinion of this court to the effect that "a consolidation is not a sale." That the word "consolidation" is used in the Utah statute in its restricted, that is, its ordinary sense, is evident from the provisions of the statute in relation to the consolidation of railroad corporations, appearing at page 217 of the statutes of 1876 and from the provisions in relation to consolidations in the statutes of 1898, as amended by the act of 1905.

The transaction in question can in no manner be justified by the provision of the law of Utah in force at the time the Alice Company was organized permitting a consolidation of companies organized under its provisions and en-

gaged in the same character of business. However the right of one corporation in Montana to hold stock of another can be deduced from its consolidation statute, no such right flows from the Utah statute on the subject of consolidation.

The omission of the legislature of the State of Utah to empower mining corporations to hold stock in other corporations must be considered as a denial of such right. In the year 1905 the legislature of that State invested *irrigation* corporations with the power to hold stock in other companies. Section 57 of an act approved March 9, 1905, reads as follows:

> "SEC. 57. *Stock May be Taken in Other Irrigation Companies.*—Any irrigation or reservoir company, incorporated and existing under the laws of this State, may purchase or subscribe for the capital stock of any other similar corporation, which, at the time of such purchase or subscription, shall be or is about to be incorporated; *provided*, that such purchase or subscription shall be made only when permitted by the original articles of incorporation or by amendment thereto proposed and adopted according to law, and such corporations are hereby permitted and authorized to amend their articles of incorporation so as to authorize such purchase or subscription."

The express grant of the right to irrigation companies clearly indicates that the legislature of Utah understood that without direct authorization irrigation companies would have no such power. It will be noted likewise, that irrigation companies were not generally clothed with authority to hold stock in other companies. They were not to be permitted to acquire property of that character unless the articles of incorporation expressly declared that they might. The articles of the Alice Company do not authorize it to become the holder of stock in another corporation, and it can engage in no business except that which is authorized

by its articles, as has been held by the Supreme Court of Utah in

Seeley *v.* Ass'n, 75 Pac., 367.

Here, likewise, the general rule is recognized, but it is asserted there are exceptions to the rule, and that the present case comes within the exception.

One exception to the rule is that where a debt is due to a corporation it may accept stock in payment for the debt or as collateral security. In Bank of California *v.* Kennedy, referred to above, the Supreme Court of the United States recognized this ruling. A national bank is forbidden to take security for any loans it may make on real property, but if it does make a loan, and afterwards its safety becomes doubtful, or the bank is unable immediately to collect, it may take security upon real estate or it may levy an execution upon real estate and sell the same for the satisfaction of the debt. But such conditions do not exist here, and they afford no warrant whatever for a voluntary exchange of the property of the company for stock in the Anaconda Company, nor do the authorities involving them afford any justification for the attempt on the part of the directors and a majority of the stockholders of this company to transform the Alice Mining Company from a mining corporation into a stockholding company.

It is said likewise in this connection that a corporation is entitled to take stock in another corporation for a temporary purpose. It may take it for the temporary purpose of utilizing it for the liquidation of a debt, as above indicated, but there is no rule supported by any reliable authority to the effect that it may take it for any and every purpose, provided that purpose be a temporary one. If the directors and a majority of the stockholders of the Alice Mining Company concluded to make a stock-jobbing company of the Alice Mining Company, all the stock it acquired

would be held for a merely temporary purpose. It would buy stock with a purpose not to hold it as a permanent investment, but in the expectation of selling it as speedily as possible, and yet it will scarcely be contended that the Alice Gold and Silver Mining Company would have any power either to acquire or hold stock for any such temporary purpose. But what is the temporary purpose for which it is said this stock was acquired? It was contended at the argument in this connection that it was taken as a step in the dissolution of the Alice Company, and with a view to the distribution of its assets among its stockholders, but an examination of the circular letter issued to the stockholders and the minutes of the proceedings of the stockholders' meeting discloses no intimation of even the remotest character of a purpose to effect a dissolution of the company, and it was not until a year after that any suggestion was made to the stockholders that a dissolution was contemplated. On the contrary, the original letter, on the faith of which it is to be presumed the stockholders acted when they authorized the sale, clearly carried an implication that the Anaconda stock was to be held as a permanent investment by the Alice Company, as it rather glowingly set forth the prospects before the Anaconda Company, allowing the inference to be drawn that the Alice Company would thereafter be the recipient of dividends of considerable amount which it would be in a situation to distribute among its stockholders.

The testimony of Mr. Kelley is, of course, quite direct, that the general plan of consolidation, subsequently including the Alice, was to cause the property of all of the companies to be transferred to the Anaconda and then to procure their dissolution. Although it was not so stated explicitly, perhaps, it is to be implied that the Anaconda stock received by each company was to be distributed among its stockholders, as it afterwards was, save that the present proceedings interfered with the distribution among the Alice

stockholders. In other words, it never was contemplated for a moment by any one that the 30,000 shares of Anaconda stock should be turned into cash, put up to the highest bidder and sold. No such plan was carried out and it would have been destructive of the whole policy under which the properties were handled to have followed any such course. The Alice was to be dealt with just as was any other subsidiary company. The Amalgamated officers never had any purpose to have the stock received by the Boston & Montana put up for sale at auction with the probability that actual investors would run the price up on them or get the control of the properties out of their hands, or that speculators would enter the contest and compel them to pay an exorbitant price for the outstanding stock. They could not afford to take any such chances and they never intended to take any such. They proposed to divide the Anaconda stock received for the Boston & Montana properties *in kind* among the holders of the B. & M. stock. Holding the control of that stock they would likewise hold control of the shares of Anaconda stock it was to distribute among its stockholders. And so with Alice. If the purpose was entertained to dissolve the Alice, it was a purpose to dissolve it upon the distribution in kind of its share of Anaconda stock among its stockholders, not upon the distribution among them of the money it should receive upon a sale of the Anaconda stock received for its properties.

It becomes necessary, accordingly, to find some authority that will justify a holding of stock acquired upon the sale of the property of a corporation, not to be turned into cash immediately for liquidation, but to be distributed in kind to the stockholders preparatory to dissolution. It is not claimed even that a stockholder can thus be forced to surrender his stock in one corporation and take in lieu of it stock in another corporation. The transaction is indefensible upon any theory of the law of corporations.

But was the stock acquired as a part of a plan of the Alice Company to convert its property and liquidate? That the managers of the Amalgamated Company may have entertained the general plan may be admitted; that there was acquiescence in this plan on the part of the directors of the Butte Coalition, who appeared never to entertain any contrary purpose, nor on the part of the Alice directors, who were mere dummies, may be true. The mere discussion of such a plan by Mr. Ryan or the announcement of his purpose to carry it out, he being at one and the same time a director of the Amalgamated, the Anaconda, the Butte Coalition and the Alice, would not make out such a purpose by Mr. Ryan *as a director of the Alice*. It is absurd to talk of Allen or Ferry entertaining any purpose at all. No one of the five directors of the Alice was the *bona fide* holder of any stock in it. They all held what stood in their names in trust for the Butte Coalition. The directors of that company may have entertained such a purpose. There is no pretense that the directors of the Alice, while acting as such, ever manifested or declared such a purpose. The nearest we get to it is that there was some discussion as to the power of the board of directors to sell all the property of the company.

Record, Vol. II, pages 858-859.

It is not suggested that this discussion—it had no necessary connection with dissolution or liquidation—occurred at a board meeting, and it is not even claimed that at any board meeting such an intention was either professed, declared or resolved. It is said that counsel for the Alice participated in the general plan, but the counsel named was a member of a law firm which for years had been the counsel of the Amalgamated Copper Company, the same gentleman who represented the Anaconda Company in the taking of the depositions in this cause in the East.

But let that go. Assume that at a meeting of the board of directors of the Alice Company—directors who had some personal interest in its affairs, not the mere representatives of the Butte Coalition Company, or the instruments of the Amalgamated—it had been resolved to make the transfer, acquire the Anaconda stock, make the distribution and dissolve. The directors of a corporation have no authority to do any of these things. It is not pretended that without the action of the stockholders they had the power even to sell—they sought explicit authority from the meeting of the stockholders. Their purpose to dissolve was equally nugatory unless shared by the stockholders. The latter were not asked for their views. Conceiving them, now, as a body, to have been capable of entertaining any views contrary to those of the Amalgamated managers, it is not improbable, at least not unthinkable, that they would have declined to sell if the proposition were submitted to them coupled with another to dissolve, or that if the two were submitted they would have approved the former and rejected the latter. It is readily conceivable that, reading the circular upon which their votes were asked in favor of selling, they were led by it to believe that the Anaconda stock would be a most valuable asset in the treasury of the Alice, yielding a revenue constantly and likely to increase in value by reason of the active development of the property it was to transfer with the other undeveloped mining claims to which the circular made reference. Indeed, it is respectfully submitted that the letter, adroitly and skillfully drawn as it was, was calculated to induce just such a belief. This means that at the time the sale was made, the directors of the Alice may have had a purpose to dissolve, rather the minds that wielded the greater organization behind it may have had such a purpose, but the Alice corporation, if one thinks of it as something separate and apart from Mr. Ryan and his associates in the larger corporation, had no such purpose.

Judge Bourquin felt impelled to reach the conclusion that the proposition submitted to and acted upon by the Alice and its stockholders was to take the Anaconda stock as a permanent investment. On that feature of the case he says:

> "Now Alice had not capacity to acquire corporate stock save under exceptional circumstances—that disposition of its property was of urgent and immediate necessity, and that no cash purchaser was available or that by trade a substantially larger sum could be realized, or the like—absent here. It is of the contract between corporations and their stockholders that any sale of all corporate property to distribute proceeds to stockholders shall be for money, the ultimate measure of value. A stockholder is not bound to accept anything but money for his equitable share of corporate property nor bound to permit a sale to be made for other chattels or goods to be distributed. Although Alice directors personally contemplated some time dissolution of Alice and distribution of the Anaconda stock, not finding expression, in contemporaneous board action, it did not deprive the taking of the stock of the quality of a permanent investment."
>
> Record, Vol. I, pages 186-187.

Even if the right to sell all of its property under the circumstances appearing could be justified, the Alice had no power to acquire or hold the stock of the Anaconda, and, accordingly, the sale was void.

IV. The Identity Between the Parties Effecting the Purchase and the Parties Accomplishing the Sale.

The deed sought to be annulled was executed by John D. Ryan, president and one of the directors of the Alice Company. He was, at the same time, one of the directors of the Anaconda Copper Mining Company, which purchased and had meanwhile become the President of the Amalgamated.

Not only was he a director of the purchasing company, but he was and for a long time had been the "managing director," becoming such, according to the testimony, about the year 1904. To all intents and purposes he was, likewise, the "managing director" of the selling company. The affairs of both companies in the city of Butte fell under his supervision. It is not in evidence that any other officer or director of either company gave any direction with reference to the business affairs of either at the time the transaction occurred resulting in the execution of the deed sought to be set aside.

This is not a case presenting the simple question of a sale from one corporation to another, the two having a common director. It embraces, indeed, such a condition, but that condition is relatively unimportant, and the cases which consider sales of that character are helpful, but they are weak, because of elements uniting with that feature in this case very much more perilous to the validity of the sale under consideration. To illustrate: Mr. Ryan is a member of the board of directors of the Chicago, Milwaukee & St. Paul Railway Company. It is likely to be a heavy purchaser of copper in the near future and may, probably will, buy from the Anaconda, of which he is a director. But it does not appear, and the fact probably is, that he exercises no such dominating influence over its affairs as he does over those of the Amalgamated or its subsidiaries. Neither that company nor the Anaconda appear to own any stock in the railroad company. There is not shown to be any intimate relationship in the management of their business. The manager of the railroad company, even its purchasing agent, could probably exercise his judgment in placing the order without dread of dismissal should the award be made to some copper company other than the Anaconda. I say perhaps he could. If the purchase were considered at a board meeting, it is not unlikely that some of the members, even

a majority, might not be the owners of any Amalgamated or Anaconda stock—men who are in a situation to exercise the unbiased business judgment which the immensity of the transaction required. If the sale were made and a court were called upon to pass judgment upon it, the rule of a common director would be applied. It would be applied in view of a multitude of instances which the history of corporations affords of frauds worked upon stockholders and the public in such sales.

The exposure of the transactions through which the Chicago & Alton was looted gave proof of the wisdom of the rule under which such sales are subjected to careful scrutiny by a court of equity.

It was with reference to such a case—that is a case of common directors, merely—that the Circuit Court of Appeals for the Ninth Circuit said in

Idaho-Oregon L. & P. Co. *v.* State Bank, 224 Fed., 39:

> "Contracts made by directors who represent opposing interests, while not void *ab initio* are voidable in a proper proceeding taken for that purpose by the corporation, its shareholders or its creditors. 10 Cyc., 791. Richardson *v.* Green, 33 U. S., 30."

We do not pause to inquire whether there be any essential difference on the point in question between that court and the Supreme Court of California in a late case,

Sausalito Bay L. Co. *v.* Sausalito Im. Co., 136 Pac., 57-59,

in which that court quotes approvingly the following from O'Connor *v.* Coosa F. Co., 95 Ala., 617; 35 Am. St., 251, which it refers to as the "correct doctrine," namely:

> "If the same persons as directors of two different companies represent both companies in a transac-

> tion in which their interests are opposed, such transaction may be avoided by either company, or at the instance of a stockholder in either company, without regard to the question of advantage or detriment to either company. Both the corporations are armed with the right to repudiate such a transaction, no matter how fair or open it may be shown to be. * * * The general rule is that such dealings are not absolutely void, but are voidable at the election of the respective corporations, or of the stockholders thereof. They become binding if acquiesced in by the corporations and their stockholders."

But when the one corporation actually owns a majority of the stock of the other corporation, so that it is bound and helpless, or it is equally so because the control is exercised even without the ownership of a majority of the stock, justice demands the application of another rule.

The writer is constrained to believe that the apparently irreconcilable differences in the statement of the rule applicable to the case of a sale from one corporation to another having a common director spring very largely from the degree to which control was exercised in each particular case. Cases can be found which, on the one hand, declare such a sale to be absolutely void, and on the other that the fact is a mere circumstance tending possibly to show fraud, but of itself of little consequence.

Authorities are not wanting that hold a transfer from one corporation to another, the two having a common director, as absolutely void. Such is the conclusion that must necessarily be drawn in such cases as

> Munson *v.* Syracuse, 103 N. Y., 58.
> Summers *v.* Glenwood, 86 N. W., 749.
> Thomas *v.* Brownville, 2 Fed., 877.

On a proposition such as this, on which the authorities are in a state of the greatest confusion and in respect to

which there is much conflict that is irreconcilable, comparatively little aid can be given the court by reference to individual cases. It is believed that it will be more helpful to refer the court to what is said upon the subject in the modern text-books which have considered it. We quote the following from the second edition of Thompson:

> "Contracts between corporations having a common directory are regarded by the courts very much with the same suspicion as contracts between individual directors and their corporations. Some courts have gone to the extent of holding that such contracts are *prima facie* fraudulent and void. But the more general as well as the more reasonable rule is that such contracts are not void but voidable. And the fairness of such contracts must be shown by clear and convincing proof, and it must be made to appear that they are absolutely free from fraud. Contracts between corporations having a common directorate are voidable, although there was a quorum in each board of directors who were not directors in the other. * * * In England corporations having directors in common are prohibited from contracting, and such contracts are made void by statute, unless they are ratified by a vote of the stockholders. Under such statute it is held that a contract so made could be ratified, although the by-laws prohibited the directors from making contracts in which they were interested. In New Hampshire such contracts are held invalid on the ground that stockholders and creditors are entitled not only to the vote of a director in the board, but to his influence and argument in discussions. Dealings between corporations represented by the same persons as directors may be accepted as binding by each corporation and the stockholders thereof. The rule is that such dealings are not absolutely void, but rather voidable at the election of either corporation, or of the stockholders thereof; and they become binding if acquiesced in by the corporations. A contract between two corporations with

the same directors and principal officers will be presumed fraudulent as between them; but such presumption may be overcome by convincing proof that the transaction was fair."

II Thompson on Corporations, sec. 1242.

And the following from

10 Cyc., 791.

"*e. Cannot Act for Corporation and for Opposing Interest.*—Contracts made by directors who at the same time represent an opposing interest, generally where the other contracting party is a corporation in which they are also directors, are not void *ab initio*, but are voidable in a proper proceeding taken for that purpose, by the corporation, its shareholders, or its creditors."

After having canvassed the subject of a sale of corporate property made to a director and the principles applicable thereto, the author of the American and English Encyclopedia of Law, says:

"2. *Contracts Between Corporations Having Common Directors or Members.*—The principles above stated apply not only to the case of a director contracting with his own corporation, but also to that of directors of one corporation contracting with themselves as directors of another corporation."

21 Am. & Eng. Ency. of Law (2d ed.), 899.

Noyes on Intercorporate Relations, says, at section 114, that

"where the directors of the vendor corporation are substantially interested in the vendee corporation, a sale of corporate assets will be annulled if unfair, and the burden is upon the directors to show its fairness. And if the directors of the vendor corporation are likewise directors of the vendee corpora-

tion and thus control the action of both, the sale is voidable and will be set aside at the instance of a stockholder, regardless of its fairness."

It will be observed that when, in addition to the fact that the buying and selling corporation have a common director, it appears that the owners of a majority of the stock of one corporation acting through the directors thereof, or otherwise, are interested in the stock of the other corporation, or exercise a controlling influence over its affairs, the transaction becomes even more vulnerable. This branch of the subject is considered by Thompson in the section succeeding the one last above referred to. The discussion is introduced by the following:

"SEC. 1243. *Directors Contracting with Another Corporation in Which They Own Stock.*—Contracts of consolidation, lease or sale are frequently entered into between corporations where the directors of the one are largely interested in the stock of the other; or where one corporation owns a majority of the stock of the other contracting corporation; or where the stockholders of the two corporations are practically the same. Such contracts are governed by the same rules, substantially as those where directors deal with themselves, or with the corporation. They are not necessarily void, but if there is actual fraud or if any undue advantage is taken, or the contract is unfair, the courts will give relief at the instance of the injured party. Thus, where a majority of the directors were interested in a contract adversely to the stockholders of the other contracting corporation, the contract was held illegal, and the fact that the directors made the contract openly did not validate it. So, minority stockholders may have a lease canceled which is made by officers and owners of a majority of the stock to another corporation."

The court will observe that a case of that character is governed by the same rules as are applicable where the directors

deal with themselves personally—that is to say, where they buy from or sell to a corporation of which they are directors, not for another corporation, but for themselves personally. On principle, it is impossible to make any distinction between the case of a director of a corporation buying its property on his own account or buying it as the agent of an individual, or buying it as the director of a corporation, either as agent for some one else or as the director of a corporation. He is bound by his duty under the law to act with the same careful regard for the interest represented by him as he would were he acting for himself. It is conceded, of course, that authorities can be found asserting the proposition that a sale is not voidable when made by one corporation to another corporation having a common director, no other feature being involved. The case of Smith *v.* Ferries so holds and other California cases asserting the same doctrine, but it is impossible to reconcile the California cases upon this and related subjects. Authority can be found in the California reports for practically every gradation in view on this subject, from the idea that the transaction is absolutely void to the idea contended for by the defendant, namely, that the fact is a mere circumstance, and that the burden is upon the party attacking the transfer to show that it is in fact fraudulent.

It will not be necessary to go into the collateral questions involving the principles now being considered to show the conflicting authorities coming from California. The case of

San Diego *v.* San Diego, 44 Cal., 106,

appears to be directly opposed on the very question being considered to the holding in Smith *v.* Ferries. That action was brought to have declared void a deed executed by the trustees of the city of San Diego to a corporation, of which one of the trustees was a stockholder and director. The court, having referred to the general principle "that no man

can faithfully serve two masters whose interests are or may be in conflict," and the application of it to the case of a sale by one to a corporation of which he is a director, continued:

> "But it is claimed by the respondent that the rule does not apply in this case, because, the conveyance being to the railroad company, Sherman as a stockholder had only a remote or contingent interest in the land conveyed.
>
> "While it is true that a corporation holds the legal title of the corporate property, it is equally true that it holds it for the benefit of its stockholders. In them is the beneficial interest. If it makes, it is their gain; and if it loses, they bear the loss. At common law, though not parties to the record, they could not be witnesses for the corporation, for in all matters in which it was concerned they were considered to have a direct, certain and vested interest.
>
> 1 Greenleaf on Ev., sec. 333.
>
> "Men may, and often do, feel as deep a concern for the success of a corporation in which they are interested as for their own private affairs. To hold, therefore, that one intrusted with property in a fiduciary capacity may rightfully bargain in reference to it with a corporation in which he holds stock, would be to ignore all the evils which the rule in question was intended to prevent.
>
> "But Sherman was more than a stockholder; he was a director of the corporation, also. As such he sustained the relation of a trustee to the stockholders, and it was his duty to use his best efforts to promote their and the corporation's interests."

That the same minds which in this case directed the submission of the proposition to sell directed, as well, the acceptance of the same by the stockholders' meeting is incontrovertible. D. Gay Stivers, one of the Butte attorneys of the Anaconda Company, went from there to Salt Lake to attend the meet-

ing. He, Mr. Ferry, one of the members of the law firm of Richards, Richards & Ferry, attorneys for the Alice; Mr. F. S. Richards, a member of the firm, and Willard Hamer, a clerk in their office, cast every vote recorded in favor of the resolution of sale. It is obvious that these gentlemen had instructions concerning what was expected at the meeting. None were conveyed by letter to the gentlemen residing at Salt Lake, and it is reasonable to assume, as Mr. Allen assumes, that Captain Stivers, one of the Anaconda attorneys, had oral instructions from Mr. Kelley, its chief counsel.

Various letters transmitting proxies to Ferry and telegrams concerning same give no directions as to how he was to vote them.

Record, Vol. II, pages 657-665.

Ferry reported to Allen that the business of the meeting had been transacted "according to the plan outlined."

Record, Vol. II, page 656.

Nor is it possible to obscure the guiding hand, the controlling influence of the Amalgamated officers, in this transaction behind the ownership of the majority of the stock of the Alice by the Butte Coalition. It is unnecessary to review the facts disclosed by the evidence of the identity of the governing minds whose will was reflected in the acts of this company and those the majority of whose stock was owned by the Amalgamated.

When the plan was formed to consolidate all the subsidiary companies of that combination, the Butte Coalition and the Red Metals, whose stock the former owned, were included as a matter of course. In the execution of the plan it was found necessary to embrace the Alice because its stock was held by the Butte Coalition, but the latter was regarded in the original plan exactly as was the Anaconda or the

Boston & Montana or the Parrot. There never was any doubt, apparently, upon the part of those who conceived or carried out the plan to unite the title to all the properties of these companies in the Anaconda, that the Red Metals or the Butte Coalition ought to be included or that there lurked here any special danger to the success of the plan. That plan did not contemplate the acquisition of new properties not theretofore controlled by the Amalgamated; it embraced only those which could be spoken of as Amalgamated properties—in which the influence of that organization was dominant. Furthermore, the circumstances attending the birth of the Red Metals and the Butte Coalition forbid us to believe that it was not controlled by Amalgamated influences in its infancy, and every fact developed tends to confirm the presumption of the continuance of the relationship which came into existence on its organization.

The Red Metals took the Heinze properties on the settlement of the bitter, protracted, and expensive litigation which had been waged. All the negotiations for that settlement were carried on by Ryan, on the part of the Amalgamated. He and Cole were at the time associated in many business enterprises, chiefly mining. Cole took an assignment of all the claims of Heinze against the Amalgamated and released them all in consideration of the release by the Amalgamated of all claims against Heinze and his companies. It may be true that the public being informed that a settlement had been or was to be effected and that the Butte Coalition was to hold the stock of the Red Metals, to whom the Heinze properties were to be transferred, eagerly subscribed for the stock, so that the Amalgamated was not even called upon to put up any money to acquire the properties. But the stock was subscribed for thus eagerly only because it was and must have been understood that the company was to be another subsidiary, as it was. The stock must have been underwritten, in effect, if not in form, by the

Amalgamated. It was agreed that Heinze was to get $10,500,000. If the amount had not been forthcoming from subscriptions for Butte Coalition, the Amalgamated was bound to take enough to make up that figure. It is of no consequence that it actually became the owner eventually of but 50,000 of the 1,000,000 shares. The company was organized by its officers and others in most friendly relations with them. It could not afford to have it otherwise. Of what avail would it be to have reached a settlement if the properties should pass to a company in which its voice was not potent? No one ever charged the gentlemen who have directed the business affairs of the Amalgamated with a want of ordinary business sagacity. It might as well have left the properties with the Heinze companies as to have procured them to be transferred to a company in which it had no controlling voice. Its officers became stockholders in the Butte Coalition, Mr. Ryan, himself, Mr. Rogers, Mr. Rockefeller, and Mr. Addicks.

Record, Vol. I, page 427.

In fact, the 50,000 shares which the Amalgamated acquired came from the generous store of Mr. Rogers, who, because of some consideration dating back to the time of the organization of the company, when it had an "option" to take some Butte Coalition stock, let the company have a bagatelle of a million's worth, practically, at $16.50, when it was selling at $31 and $32. This "option," which would have been a most interesting contribution to the history of this transaction, could not be produced.

Besides the officers of the Amalgamated many of its employees took stock in the Butte Coalition. It was not without reason that the former said in its annual report for 1906 that parties "friendly" to the Amalgamated had acquired the Heinze properties,

Record, Vol. II, page 590;

that they had been transferred to the Red Metals Company, whose stock was held by the Butte Coalition "controlled by the same *friendly* parties" (*Id.*) So friendly were they that despite the furious controversies of the past the same attorneys thereafter handled the business of the Red Metals Company and all the other Amalgamated companies. With the stock owned by the principal officers of the Amalgamated, its own holdings and such as it could control in consequence of proxies sent on blanks which went to every stockholder with notice of a meeting, there never was a time when it did not control the Butte Coalition. Control through proxies is now well understood. The officers of successfully conducted mutual life insurance companies perpetuate themselves in office in that way. The American Tobacco Company actually owned but a very small percentage of the stock of many of its subsidiary corporations, and the same conditions existed in the case of a number of those controlled by the Standard Oil. A list is given in each case with the opinion of this Court.

It is asserted in

Hyams *v.* Calumet & Hecla, 221 Fed., 513-541,

that control by proxies of one company selling to another, presents a case, so far as the validity of the sale is concerned, that differs in no essential particular from control by stock ownership. The case last referred to is interesting. It involves a consolidation of the Michigan copper companies. Liberal Michigan statutes touching the ownership of stock in one corporation by another saved the consolidation in its initial stages.

Bigelow v. Calumet & Hecla, 155 Fed., 869; S. C. 167 Fed., 704.

But when the plan to arrest which the suit, resulting as in the opinions cited, was begun, was carried out and its opera-

tion observed, the court came to the conclusion, perhaps because there is less tolerance than formerly of such combinations, that it is illegal.

The consolidation was condemned because, as the court expressed it, "The Calumet & Hecla was, in the transaction in question, both buyer and seller."

Hyams *v.* Calumet & Hecla, 221 Fed., 542.

The rights of the parties to this litigation are to be determined just as though the Amalgamated or the Anaconda owned a majority of the stock of the Alice instead of such ownership being in the Butte Coalition. No one can doubt that the difficulties in the way of the carrying out of the general plan of consolidation were heightened in no material degree, because either of the two companies first named did not own a majority of the Alice stock. The real power which put through the transfer was the same as though one of them was the majority holder of the Alice stock.

But whatever view may be taken of the relationship between the Alice and the Amalgamated or the Anaconda, the connection of Mr. Ryan with both of the corporations, the purchaser and the seller, requires that the sale must be characterized by *uberima fides* or it cannot be sustained.

(*a.*) It must appear that it was wise to sell and that some condition had arisen such as would prompt a sale had the property been owned by a company under no compulsion to sell, nor subject to the dominating influence of the buyer.

(*b.*) It must appear that all information in the possession of the purchaser affecting the value of the property was given to the vendor.

(*c.*) It must appear that the consideration was altogether adequate.

(a.) Mr. Corry and Dr. Weed both declare, what is obvious, that it was unwise on the part of the Alice to sell—if one may speak of the Alice as having sold.

It is of no consequence whatever that it should appear that a piece of mining property was sold for the price it would bring in the market; a preliminary question is to be determined, and that is the necessity to make a sale at all. It is a perfectly well-known fact that mining property, valuable only because of ore which may be found within it at great depth, is exceedingly unsalable property, at any figure approaching its real value. Few people buy property of that character in the expectation of selling it again. Those who acquire an interest in it acquire it ordinarily in the expectation that some arrangement will be made for the operation of the property and the extraction of the values within it and they expect in that way to realize many times the amount that could be realized for it upon a sale for cash. Now what reason was there that ought to impel the stockholders of the Alice Gold & Silver Mining Company to sell their property to the Anaconda Copper Mining Company? It is true the property had not been profitably worked for a number of years, but it is likewise true, and it is idle to attempt to conceal the fact, that it lies within what has been considered, until very recent years, exclusively a silver district. It had ceased to be profitable to work it as a silver mine. Some effort had been made to determine whether the zinc ores could not be mined at a profit. The result of the tests is before the court in a very general kind of way. But let it be assumed that, in the present state of the metallurgical art, the ores were shown to be too refractory for successful treatment. Progress along these lines has not reached its limit, however, and it is a mere matter of time when these ores will be immensely valuable. And it is equally idle to attempt to obscure or conceal the fact that the copper producing area of the Butte camp is yearly being extended

into and beyond the region of the properties of the Alice Company. Experts of the highest character declared it altogether improbable, not to say impossible, that copper should be found in the properties of the Butte-Superior at the eastern extremity of the Rainbow lode which traverses these properties. It is producing copper in very considerable quantities today, and the corporation is operating most successfully. Between them and the properties in question lie Senator Clark's Elm Orlu and Poser. The former, at least, produces copper of the very highest character. The same Rainbow lode which gives value to the claims last named traverses the Alice properties itself, and is cut by the Jessie vein, one of the enormous producers of the Butte camp. Its productive character and capacity have been demonstrated only with recent years, and in the last few years the Badger State has developed into one of the phenomenal producers of the camp.

Why should this property be sold to the Anaconda Company now? Certainly within the last four years, in view of the developments referred to, its prospects as a producer of copper are no less alluring than they have been for ten years and they are unquestionably more promising now than they have been at any time since the Butte Coalition Company acquired a majority of the stock of the company. The Anaconda Copper Mining Company and its engineers certainly anticipate that this property is going to return them the price they paid for it, or they never would have paid it. No reason is suggested why they should have it, why they should want it, except that they expect to realize at least what they paid for it. Now why was the sale of the property made, considering the interests of the Alice stockholders? Was there any clamoring for a sale of the property on the part of any of them outside of the interests associated with the Amalgamated Copper Company, which, apparently, desired the property transferred to the Anaconda Mining Company?

But if, upon a consideration of all of the circumstances and conditions in which the property seemed to be placed, an independent owner of the property would feel that he ought to make a sale of it, what would he do? He would unquestionably employ some high class, competent mining engineer, whom he would fully assure himself beforehand had no relations whatever with the Anaconda Copper Mining Company, or any of its associated companies that would in any manner influence or bias his judgment. He would procure him to make an examination of all of the conditions. He would ask him to take into consideration all he could learn concerning the extension of the copper producing district into the neighborhood of the claims and the prospects, if any there were, arising from the recent production of copper, both from the Jessie vein and the Rainbow lode, and he would take the advice of such an engineer as to the fairness of the price offered by the Anaconda Copper Mining Company. Then any ordinarily prudent and sagacious owner of such a piece of property would, as a matter of course, make the most diligent effort to find some other party who might desire to purchase the property, with a view to determining whether better terms could not be obtained. The testimony in this case is that practically any property in that region could have been "floated," as the expression is, in what are spoken of as the "boom times" from 1904 to 1907. Those times will come again if they are not now here. Those were boom times, because copper was commanding from twenty to twenty-five cents per pound. With the extraordinary prices now prevailing, there should be no difficulty whatever in finding some one who would be glad to take the property on the usual bonding terms, agreeing to expend large sums of money in the exploitation of the property. It is not in evidence that the stockholders of this company were ever asked even to give a bond on the prop-

erty, even in the boom times, with a view to the disposition of the same to their advantage. The stock of the company during that time was selling on the open market for from eight to nine dollars per share. The company had accumulated an indebtedness of $34,000 after a period of practical idleness for twelve or thirteen years, but in view of the value which the property is conceded to have — upwards of a million of dollars — that must be regarded as a mere trifle. It could have been easily adjusted. In fact, there is no pretense that the Butte Coalition Company was demanding satisfaction of the indebtedness due it, or that it was not perfectly willing to carry the obligation upon the ample security of the properties of the company. There was no justification for the sale. It was made because, in the pursuit of the purposes for which it was organized, the Amalgamated Copper Company wanted it. No effort was made to find another purchaser, because that would interfere with its purposes.

Again, if the price paid, practically a cash price, was adequate, as a cash price, it is to be borne in mind that mining property ordinarily brings so little on a cash sale that it is disposed of, as a rule, under lease and bond. In all probability the stockholders of the Alice, if it could be conceived that they were at liberty to act freely in accordance with an untrammeled judgment as to what was to their best interest, as such, would have preferred to contract in the usual way for the sale of the property at a figure considerably in advance of what it would fairly bring for cash.

The sale was not moved by any consideration of what was for the best interests of the stockholders of the Alice. It came about because the Amalgamated wanted the property—wanted to have the title in the Anaconda. It fixed a price on the property and the regular procedure followed in the case of all of its subsidiaries was pursued.

b. While in cases of a purchase by one corporation of another having a common director the authorities lay special stress upon the necessity of a full disclosure, it is obvious that, under the conditions that obtained, the result would have been no different, however complete had been the exposition of the facts touching the value and prospects of the property of which Mr. Ryan and the purchasing companies had knowledge. They had the votes to put the plan through, and there was no one to whom the information could be given save to a helpless minority. It was impossible to lay the truth before any stockholders of the Alice so as to inform their judgment. The condition emphasizes the impossibility of upholding this sale as against the dissenting stockholders. However, the obligation rests upon a purchaser situated as is the Anaconda or the Amalgamated to make full disclosure of all facts of which it has knowledge likely to affect the value of the property. Can any one believe that the Alice stockholders were as well informed or could be as well informed concerning the property and the conditions which affected its value as was Mr. Ryan, and through him the companies, in the direction of whose activities he was so potent a factor, if, indeed, he did not absolutely direct them? He had an opportunity to know, as perhaps no other man knew, about the entire Butte field. It is idle to assert that the value of the Alice property was not vitally affected by the success or the want of success which attended the explorations and operations in the Badger State. Ryan knew in detail about them. The Alice stockholders, save those in his confidence, could only guess at what was going on, and, of course, had no means of knowing of the showing that was followed by a production of 1,310,431 pounds of copper in 1910, 6,079,005 in 1911, 10,135,197 in 1912, with 80,149 ounces of silver in 1910, 411,367 in 1911, and 687,208 in 1912.

In 1911 the Amalgamated was able to say in its annual

report that "There is a general opinion among those familiar with this property and its development that it is destined to become one of the great mines of the district." In 1912 it reported "very gratifying results" from development work done on the 1100, 1300, 1400, 1600, and 1800 levels. The results were indeed so gratifying that the stockholders were advised that during 1913 it was proposed to sink a shaft on the Moose to a depth of 1800 feet "to prospect the veins at greater depth" than they had been tried out by the old shallow workings on that claim, which is a very small one abutting the Alice property.

Despite the plain purpose indicated in the report to prospect the veins in the neighborhood of the shaft so to be sunk, an effort was made at the trial to impress upon the court the view that it was being sunk primarily for ventilation. The report refers to the fact that it will be convenient in connection with the ventilation of the Badger State, but the primary purpose is not to be doubted.

The vast promise held out by the great Jessie vein so far to the northwest was preserved a secret from the dissenting Alice stockholders.

The Amalgamated people knew practically as much about the developments in the Butte Superior and Senator Clark's properties as of their own. The Alice stockholders were not on the same footing at all as to information relating to the value of the properties in question. The Amalgamated sent out Herman Keller, Frank Klepetko and Professor Kemp of Columbia University to value the properties going into the consolidation, and though they were sent for that express purpose the Alice stockholders were not apprised as to any judgment these gentlemen expressed concerning the property. The court is told that Professor Kemp made a trip to Butte to examine these properties to aid in placing a valuation upon them so that the proportion of Anaconda stock each received should be ratable and the total just. There

is no report from him or his associates available—at least none touching the Alice.

c. Value.—A prominence has been given to the subject of value in the consideration that was accorded to this case in the district court quite disproportionate to its importance. If the conclusion should be reached that the majority stockholders had the power to dispose of all the property of the Alice in bulk and that they had the right to take Anaconda stock in exchange, and that either there is no offense against the Sherman act in the transaction, or that minority stockholders cannot be heard to complain on that score, and that the sale is not voidable at the election of any of them because of the control which the Anaconda, the buyer, exercised over the Alice, the seller, and of the other circumstances attending it, including the want of any showing whatever as to why, considering the interests of the Alice stockholders, any sale at all should be made, but is voidable only for inadequacy of the consideration, the question of value becomes one of first importance. It was, perhaps, magnified until the other important questions of law and fact presented by the record were lost sight of.

It is unnecessary to review at length the testimony on value. The burden is on the appellants, as all the judges called upon to pass upon the evidence held, to show that the price paid was all the property was worth.

In his opinion herein Judge Hunt says:

> "It seems clear that considering all the interrelated associations of the corporations heretofore referred to and of the directorships of Mr. Ryan in the several companies, minority shareholders have a right to call upon the courts to require the purchasing company through those of its directors who were also interested in the selling company, to disclose everything which they knew concerning the value of the Alice, the sources of such knowledge, the reasons for

the sale, and the fairness thereof. Thus it devolves upon Mr. Ryan to show that all knowledge which as a director of the Anaconda he obtained concerning the Alice properties was given to the directors and shareholders of the Alice Company."

Record, Vol. I, pages 173-174.

Judge Bourquin said:

"An arbitrary price is *prima facie* unreasonable, and, when assailed as unfair under circumstances like those involved, who defends it as reasonable must prove it.

"Because of common directors, the learned judge who granted the injunction held the burden was on defendants to clearly demonstrate the sale was fair, and the case was tried on that theory. This burden has not been sustained. It is not clear the price paid was substantially adequate, and so the court finds it was not.

"It is impossible to reconcile the cases upon the law of common directors.

"See

Cooke, Corporations, sec. 658, *et seq.*
Thompson, Corporations, secs. 1242, 1243.
Thomas *v.* Ry. Co., 109 U. S., 522.
Leavenworth *v.* Ry. Co., 134 U. S., 689.

"The rule is a good one and general that wherever fiduciary relations exist and in discharge of duty there is conflict of interest, if the transaction is not void, as it often is, it is open to impeachment by the beneficiary, will be closely scrutinized by the court, and if the trustee does not make manifest its fairness, it may be set aside or other relief granted. Corporate transactions like this at bar ought to be subject to this rule. That the common directors were not a majority of either board is a difference in degree, but not in principle. They may have dominated the board. In both cases is divided duty, conflicting

interest, possible impaired judgment of unknown effect, difficult of proof and danger to stockholders."
Record, Vol. I, pages 183-184.

It is clear that those who controlled the Anaconda wanted the property, and that they fixed the price that was to be paid for it. It is not in accordance with the experience of mankind to find full value paid under such conditions. Who says the price paid was adequate? The writer entertains a very high regard for Mr. Gillie and the other employees of the appellees whose testimony bore more or less directly on the question of value, but might not the court reasonably expect that some one other than a servant of the Anaconda Company would be called on that important issue? The court cannot fail to be impressed with the fact that neither Mr. Goodale nor Mr. Sales was asked his opinion as to the value of the property. Even Mr. Gillie did not venture an opinion as to its market value, and Mr. Ryan simply declares that he thought "it was a very good trade" for the Alice stockholders.

Record, Vol. I, page 400.

Has the testimony of Mr. Corry and of Dr. Weed, who fix the value of the property at $3,000,000, been overcome? That enormous values are bound up in the zinc ores known to be in the mines is indisputable. The metallurgical problem is a difficult one, but not baffling when one reflects on the time, money and scientific research spent by the Butte Superior and by Senator Clark to develop an economical method, each for treating the ores from their properties, respectively. It must be admitted that the Ryan interests never tried to do anything with the Alice ores. It does not appear that they ever spent a dollar to test them out.

It was a cautiously framed question that was put to Mr. Bruce to develop the testimony that there is not at the pres-

ent time any known process by which the Alice ore can be profitably worked for zinc. But Mr. Bruce tells that in 1906 there was no process known by which the Butte Superior ores could be worked, and that there has been great development since that time in the treatment of zinc ores. He expresses no despair at all about the future of the Alice ores.

It appears that a number of new processes have recently been put in operation and it seems likely that in view of the alluring chances held out in the abundance of refractory ores, the metallurgists of the world will be wrestling with the problem of their reduction.

Moreover, it would be surprising if some of the rich copper veins coming from the southeast, shown to extend into the very region of the Alice properties, did not penetrate them. The Edith May has not been a bad second to the Jessie as a producer. The testimony above adverted to shows that the latter was barren for a long distance on the 1200 after it entered the Badger State, and yet showed wonderful richness in the lower levels. It is in evidence that the northwest series is capricious at best in character, both on the strike and on the dip. There is no reason to despair of finding copper ore in the Rainbow lode at depth. That the sources of that metal were opened by it is shown by the rich ores yielded by the Elm Orlu. More or less is encountered in the Butte Superior.

V. The Federal Statue.

Notwithstanding all three of the judges of the Circuit Court of Appeals concurred in the conclusion that the contention that the transaction under investigation is in violation of the Sherman law can not be made in this suit—that only the Government can be heard to complain on that ground in an action expressly authorized by the statute—the appellants venture to present the contrary view.

With the utmost respect for the learning and judgment of the distinguished judges announcing that doctrine, it is submitted that it is not and can not be sound. Plainly stated it is this: I am a stockholder in a prosperous going concern. It has a business built up by years of square dealing, aggressive and sagacious, yet conservative management. It pays me very satisfactory dividends upon my investment. They come regularly, not so large as something more speculative in character might return, but quite enough to meet my expectations. The majority of the stock, or say two-thirds of it, for that matter, falls into the hands of directors who are proceeding to put the company into a combination plainly forbidden by the Sherman law, or despite my protests have done so. The law officer of the Government may or may not move in the premises. If he should begin dissolution proceedings it may be years before a final decree is entered. Then the attempt to "unscramble" is made. Meanwhile the property of my company has been absorbed by the combination. Its identity is lost. Its agencies are dissipated, the trade of its customers diverted. Its good-will is gone.

I am powerless to prevent so great a wrong from which I suffer an injury quite apart from that resulting to the public generally, and the courts are impotent to protect me, it is said. The writer will refuse to believe it until this court says that such is the law.

The Calumet & Hecla Case, 155 Fed., 876, is a direct authority to the contrary, but none would seem to be necessary. There is a want of power on the part of either the directors or the majority of the stockholders to make a conveyance denounced by the Federal law, whatever the local statute may say.

Union Pacific Case, 226 U. S., 86.

The court in the suit of a private party does not undertake to dissolve the offending combination or administer

upon its property. It simply gives the peculiar relief to which the complainant is entitled.

The case of

Frank *v.* U. P. R. R. Co. and St. Joseph & G. I. Ry. Co., 226 Fed., 906,

was, like this, a case brought by a stockholder who founded his action on a claim that the directors had violated the trust reposed in them by entering into a combination in violation of the Sherman act. On that point the court said:

> "Where a violation of the Sherman act exists, such as is shown in this case, the minority stockholders may maintain a suit in equity to enjoin the special injury to their interest resulting from the acts in defiance of that statute, and need not await action on behalf of the United States seeking a dissolution of the wrongful ownership."

The same conclusion was reached in

De Koven *v.* L., S. & M. S. Ry. Co., 216 Fed., 955-957.

The authorities holding that a private party who connects himself in no way, who shows no property right in either of two corporations entering into a combination, cannot be heard to attack a transaction as being in violation of the Sherman law, are, of course, not in point.

The case of

Paine Lumber Co. *v.* Neal, 244 U. S., 459,

was such a case. It did not determine the question here presented, but held merely that "a private person can not maintain a suit for an injunction under Section 4 of the act." This suit, it need scarcely be said, is not brought under Section 4. It is an appeal to the general equity jurisdiction of the court to arrest a disposition of the corporate property which is forbidden by the law.

The case of

MacGinniss *v.* B. & M. Co., 29 Mont., 428,

proceeded upon the principle invoked. The right of the stockholder to bring the action was vindicated by the court in its opinion. It is not to be regarded as any precedent on the merits of this case, however. The statute there considered denounced combinations entered into *for the purpose of fixing the price or* regulating production.

29 Mont., 452.

Testimony was given in that case that, notwithstanding the acquisition of a majority of the stock of the B. & M., the Amalgamated had never exercised or attempted to exercise any control over its affairs. Against this were the reasonable probabilities of the case. But the court held that the mere possession of the power to regulate competition or fix prices would not make the combination amenable to the law. It is enough to say that this court has repeatedly held, as heretofore pointed out, that under the Federal act it is sufficient that the combination has such power, whether it exercises it or not. Its latest declaration is found in the opinion in

International Harvester Co., v. Missouri, 234 U. S., 199.

The essential difference between the statute of Montana as construed by the Supreme Court thereof and the Federal statute is expressed in the following:

> "The preventing of the engrossment of trade is as definitely the object of the law as is price regulation of commodities, its prohibition being against combinations 'made with a view to lessen, or which tend to lessen, lawful trade or full and free competition in the importation, transportation, manufacture or sale of any commodity or article or thing brought or sold.' See Standard Oil Co. *v.* United States, 221 U. S., 1; United States *v.* American Tobacco Co., *Id.*, 106; United States *v.* Patten, 226 U. S., 525."

Though the statute referred to was that of the State of Missouri, its identity, in the particular pointed out with the Federal law, is assumed, if not declared. The same idea is conveyed by the following from page 209.

> "It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect. Armour Packing Co. *v.* United States, 209 U. S., 56, 62; Standard Sanitary Mfg. Co. *v.* United States, 226 U. S., 20, 49. The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it."

If a combination "tends" to defeat competition, it is unlawful. Such is the character of the combination which has been the subject of this study.

It is elementary that a conveyance forbidden by a statute is void.

The Civil Code of Montana provides:

> "That is not lawful which is:
> 1. Contrary to an express provision of law.
> 2. Contrary to the policy of express law, though not expressly prohibited; or,
> 3. Otherwise contrary to good morals."
> Sec. 5051.

And equally fundamental is it that a stockholder may complain of a disposition of the property of a corporation which the law forbids.

The learned judge who wrote the principal opinion of the Circuit Court of Appeals believed there is evidence in the statute that Congress intended that a contract or transfer, coming within the inhibition of the statute, should be void only as against the Government, but valid as to every one

else. In other words, he conceived that the statute, by authorizing the institution of suits for dissolution by the Attorney General and actions for treble damages by any one injured, intended that only such actions could be maintained, in the event of a violation of the law.

It is difficult to conceive why Congress should desire to relieve an offending corporation or offending directors from responsibility to a stockholder, and it is submitted that the fact that it authorized specific actions to be maintained can not be considered as evidencing a purpose that the ordinary consequences should not flow from its declaration that contracts denounced should be "illegal."

The Circuit Court of Appeals referred to the case of Wilder Mfg. Co. *v.* Corn Products Refining Co., 236 U. S., 165, as supporting the view it took of this feature of the case. But it plainly does not hold that a protesting stockholder may not be heard to complain, not of a contract entered into by the forbidden combination in the pursuit of its business—in a just sense a contract collateral to the transaction by which the combination comes into being or expands —but a contract executed or executory through which the corporation in which he is interested is or is to be absorbed by the "trust."

In the case referred to the party complaining had entered into a contract with the corporation whose organization was assailed as violative of the Sherman act. This will plainly appear from the opening paragraph of the opinion, here quoted:

> "We refer to the parties, the one as the Manufacturing, and the other as the Refining Company. Sued by the Refining Company in April, 1909, to recover the amount of the price of two lots of glucose or corn syrup, which it had bought in January, 1909, and which it had consumed and not paid for, the Manufacturing

> Company asserted its non-liability on the following grounds which we summarize."

The principle upon which the case turned is announced in the second paragraph of the syllabus as follows:

> "The general rule is that one who has dealt with a corporation as an existing concern having capacity to sell, cannot assert, or escape liability, on the ground that such concern has no legal existence because it is an unlawful combination in violation of the Anti-Trust Act. Such a defense is a mere collateral attack on the organization of the corporation which cannot lawfully be made. Connolly *v.* Union Sewer Pipe Co., 184 U. S., 540."

It but repeats the doctrine announced in the case referred to, namely, that one who has made a contract with a corporation, can not escape the obligation into which he entered by asserting that the other party to the contract came into being in violation of the Sherman law. That rule is the rule of plain, common honesty, of elemental morals.

In each of the cases last above referred to the party complaining had purchased merchandise of the corporation whose organization was assailed as violative of the anti-trust act. The court properly held that the contract sued on was collateral, that having dealt with the corporation and secured from it the goods sued for the purchase, was estopped to question the validity of its organization.

The learned judge who spoke for the Circuit Court of Appeals on this point recognized that the contention held untenable in Wilder Mfg. *v.* Corn Products Refining Co., was advanced by one who was a party to the very contract under investigation, but he asserted that in his view the stockholder of a corporation entering into a contract with the company said to exist illegally was equally disabled. Perhaps he would be as to any contract collateral in character,

as if the corporation in which he held stock should purchase goods of the corporation whose organization is challenged.

But why should he be when he seeks to arrest or set aside proceedings for the absorption of the property of the corporation in which he is interested, the very thing the statute forbids? No rule of estoppel can be invoked against him. The appellants appeared at the meeting of the stockholders called to authorize the transfer here challenged and protested against it. They never recognized the transaction as theirs. They never sought to secure any benefits from it. With deference it is respectfully submitted that there is a radical difference, a vital difference, between the position of one who has entered into a contract with a corporation said to exist in violation of the Federal statute and a protesting stockholder of a corporation it has absorbed in the carrying out of a purpose to monopolize trade or effect a combination in restraint of trade.

Everything said by the court in the opinion in Wilder v. Corn Products Refining Co. must be considered in connection with the all-important fact above referred to. It is perfectly evident that the court did not have in mind in anything said by it a suit by a stockholder who is seeking to save his corporation from being drawn into an unlawful combination.

Some argument was made in the lower court to the effect that while a stockholder might arrest a transfer of the property of a corporation, if he moved before it became effective, equity could give him no relief if the conveyance had already been made—in other words, that a stockholder may enjoin a sale, being *ultra vires*, but that he cannot have it annulled. The doctrine thus announced is appealed to as against the claim of the appellants last argued; perhaps as against all the grounds urged by them as a basis of relief. It does not seem necessary to dwell upon this contention. What is a stockholder to do when the officers of a corpora-

tion fraudulently or *ultra vires* convey away its property before he knows anything about the purpose to do so? What is he to do when they exchange it for other property through the ownership of which the corporation is embarked in a business foreign to that for which it is created?

It is said that equity is a race between the rogue and the chancellor. Here is a case, according to appellees, in which the chancellor confesses himself beaten in a real race.

Certainly a transfer or a purchase tainted with fraud on the stockholder, either actual or constructive, is not immune from attack by him. Nor is one that is *ultra vires*. The principle to which appeal is made has no proper application. A corporation may be barred either by estoppel or acquiescence, or by virtue of the principle that equity will not interfere to annul a deed made in the course of an unlawful transaction in the prosecution of which both parties were equally guilty. The maxim applicable is trite. But it has not been applied with the same rigor by the Supreme Court of the United States as by some State courts.

Central T. Co. *v.* Pullman's P. C. Co., 134 U. S., 24.

So a stockholder may be estopped. One may become estopped from asserting that a deed is a forgery. But unless he is barred by acquiescence a stockholder may have rescission as freely as he may have injunction. How can he be charged with being *particeps* when he protests against a sale and it is made in spite of his resistance?

The foundation of the rule that a corporation may not itself maintain a suit to annul a deed made by it *ultra vires* is pointed out in

Long *v.* G. P. Ry. Co., 24 Am. St., 931.

> "Stockholders may in equity sometimes set aside *ultra vires* acts done by a corporation, which the corporation itself may not take advantage of."

Wis., etc., v. Green, etc., 109 Am. St., 381-395.

Relief appropriate to the case is granted,
X Cyc., 990,

including cancellation.
X Cyc., 992.

Rescission is an appropriate action against corporate directors charged with *ultra vires* acts.
III Pomeroy's Equity, 1093 (2d ed.).

We proceed to a consideration of the law and the facts concerning the appellants' contention that the transfer assailed was made in violation of the Anti-trust act.

The Sherman act provides:

> "SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.
>
> "Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, or, on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The law was aimed at the consolidation of business organizations, as a result of which a whole flood of public evils ensued, prominent among which was the suppression of competition and the ultimate establishment of a monopoly more or less complete. It will be noticed that section 1 denounces combinations in restraint of trade whether a monopoly is established or not; that section 2 condemns monopolies accomplished or attempted, whether there is a combination or not. It recognizes that a single individual may organize a monopoly, as if one should attempt in these times to "corner" all the grain of the country. Section 1 is aimed at combinations, the purpose of which is the absorption of rival businesses which would otherwise compete with each other, or that has for its object any other interruption of the free course of trade as it has been pursued. It was enacted to suppress the "trusts" and has come to be popularly known as the Anti-Trust Law.

In his work on Concentration and Control, President Van Hise refers to the pooling agreements of the eighties and of the causes which led to their abandonment. He then (page 69 *et seq.*) traces the various steps in the process of consolidation through the series of trusts, holding companies and complete merger. The discussion is so pertinent to the present inquiry that, lest the book may not be readily available to the court, his comments are inserted here.

> "(3.) *Trusts.*—Since the pool was a failure, in order to attain the objects striven for by it, the trust was devised. Under the trust, each unit of the combination transferred its stock to trustees. Thus the entire stock of the constituent companies was held by a group of trustees who had complete authority over the business of all the companies entering into the trust. An establishment or company retained its own officers and conducted its business, but under the direction of the trustees, as to line of product, amount of output, and price. The trust was able to prevent overbuilding

and overproduction, to prevent competition in price between its units, to apportion business, to consolidate buying and selling, and thus gave all the advantages of unity of organization, as described, pp. 8-20, due to concentration of industry. Well-known types of this organization were the Standard Oil trust, the sugar trust, the cotton-seed oil trust, the whiskey trust. The great period of the trust was from 1888 to 1897.

"If the pool was a partnership of corporations, it was even more clear that the board of trustees controlling the business of a number of corporations through their trust certificates was such a partnership. In consequence of this, in the late eighties trusts were declared to be illegal, and this led in the early nineties to the next stage of combination.

"(4.) *Holding Corporations.* — Under the trust each of the constituent companies was an independent legal entity. The stock was simply placed in the hands of the trustee for management. In the holding corporation, the stock is transferred to the holding concern, so that this corporation actually owns the stock of the constituent companies. So far as management and operation are concerned, the situation is precisely the same as under the trust, and the advantages the same, only the constituent companies are subsidiary companies instead of nominally independent. The subsidiary company maintains its officers, carries on its business, and competes so far as efficiency is concerned with the other companies of the combination; but as to nature and quantity of output and price, the policy is completely controlled by the corporation of which it is a constituent member. The era of the holding corporation began in the nineties, and has extended through that decade and the first decade of the twentieth century. Great examples are the Standard Oil Company and the United States Steel Corporation.

"While some of the holding corporations have remained merely managing companies, others of them, and some of the more important, have also become manufacturing companies. In these instances some plants are under the direct management of the directors of the corporation, while other parts of the busi-

ness are run by subsidiary companies. This stage of development is intermediate between the strictly holding corporation and the merger, next to be spoken of.

"Under the common law the stock of one corporation could not be held by another; therefore the holding corporation was declared to be invalid. This situation was met by enactment of corporation laws under which it was valid for a corporation to hold stock of other corporations. The first of the States to reverse the common-law principle was New Jersey. She has been followed by several others, notably among which are Delaware, West Virginia, and Maine. The liberal, not to say lax, corporation laws of these States have led to the holding corporations being organized under their laws, and mainly under the laws of New Jersey and Delaware. According to Frederick W. Kelsey, the State of New Jersey profits to the extent of over $3,000,000 per annum because of its pioneer position in passing liberal corporation laws.

"However, the corporations which are in whole or in part holding companies, organized under the laws of these States, are now being attacked in the United States Court. In 1911 orders were given for the dissolution of the Standard Oil and the American Tobacco companies, the first of which was strictly a holding company. (See pp. 181-187.) Many other holding corporations are now attacked by the Attorney General of the United States and must fight for their existence.

"The holding corporation began in 1897, but the great consolidations did not begin until in 1899, since which time the holding corporation has been the dominant form of consolidation.

"(5.) *Complete Merger.*—This is the final stage in concentration of management. The stock of the constituent companies of the combination is actually bought in and cancelled, the only stock being that of the master company. If, for instance, the different companies of the United States Steel Corporation—the Federal Steel, the Carnegie Steel, and others—cease to exist by their stock being cancelled and stock of the Steel Corporation be the only existing issue, we should

have the final stage of corporation management for this gigantic company.

"Since the recent decisions of the United States Supreme Court (see pp. 190-191), which seem to indicate that holding companies will be in a stronger position if they are actually manufacturing companies, it is easy to predict that the great consolidations, now forming, so far as practicable will become unified corporations. The merger began to become important about 1904, and since that time its growth has steadily continued, although, as already pointed out, the holding company is still the dominant form of concentration.

"Just as the pool, the trust, and the holding corporation have been successively attacked in the courts, there can be little doubt that the great merger will also there be attacked. Indeed, for intrastate commerce such attack has already been begun. For instance, the Diamond Match Company, which bought outright the properties of competing concerns engaged in the manufacture of matches, was declared to be an illegal monopoly in the State of Michigan. Similar attack is likely to follow for interstate commerce under the Sherman act."

The Amalgamated Copper Company did not come into existence until the "trust," strictly so-called, had gone out of fashion, under the condemnation of the courts. It typifies the holding company, but has deemed it wise to get the title to all the properties of its constituent companies in Montana in one company, the Anaconda.

One of the appellants testified to a conversation had with Mr. Kelley, the general counsel of the Amalgamated, while the work of consolidation was going on, in which the latter said that the Federal Government was opposed to holding companies. Though Mr. Kelley testified later, he did not notice this item of testimony.

The Amalgamated started off master of more productive copper properties than were ever before brought under one control. Assimilating the Anaconda, the Washoe, the Parrot

and the Colorado on its organization in 1899, and at once acquiring a huge block of Boston & Montana, it openly took over the last-named great company and the Buttte & Boston in 1901, an eighty-million-dollar purchase. In 1906, the Heinze properties were absorbed, and in 1910 the Clark mines, and the rich area belonging to the Alice, since which time it has been without a rival worthy of the name in the Butte field.

We are not permitted to imagine that the firm of Kidder, Peabody & Co., bankers and brokers of Boston, just happened to have $80,000,000 worth of these stocks in their safe, any more than that Mr. William S. Bogart just happened to have about his person or in his strong box the fine assortment of stocks acquired by the Amalgamated when it began business, and for which it paid $75,000,000. These people simply held the stock for the projectors of the company, who, in what seemed to them the appropriate and propitious season, caused it to be turned over to the company. It implies, as every one conversant with business transactions of the magnitude of these will recognize, a campaign to accumulate by the projectors through their agents and brokers the huge blocks thus formally purchased by the company.

Doubtless the Boston stocks had been held for some time previous to May, 1901, by the parties who were ordering the affairs of the Amalgamated. This is obvious from the recital of documents in the record. It appears therefrom that Mr. Rogers was a Boston & Montana stockholder, that some litigation in New Jersey had intercepted an effort which had been in progress for some time to acquire these stocks, and turn them over to the Amalgamated.

There is only one conclusion to be drawn from the testimony. The Amalgamated actually did formally acquire within two years of its organization all, or the majority of the stock of six great, prosperous, competing copper com-

panies of the Butte camp, including the largest producers in the world, the group putting out about 90 per cent of its copper yield. It is reasonable to assume that it was organized for the purpose of thus acquiring and holding those stocks. Its subsequent acquisition of the Heinze properties, the Clark properties, and the Alice properties is reasonably to be assigned to the purpose entertained by its projectors at its birth. But whether there was any such purpose or not, the combination was formed, and the various corporations were absorbed and consolidated.

It is unnecessary to prove that any monopoly was established, or that it was the purpose of the projectors to monopolize the copper production of the country. A consolidation of competing companies producing and selling in the markets of the world a very considerable part of the copper which found its way therein, was effected, necessarily eliminating competition between them. The organization was not the result of the ordinary growth and expansion of a business. If under Mr. Daly's efficient management the Anaconda Company had accumulated a surplus which it desired to invest, or its credit was good and it was deemed good business to extend its holdings, it might legitimately have gone out and bought the Colorado properties, or those of the Parrot or of the Butte and Boston, or possibly of the Boston & Montana, though such a purchase would give rise immediately to a suspicion that the purchase was made to get rid of a damaging, if not disastrous, competition. If he had accumulated them all at one time, or practically at one time, the conclusion would be well-nigh irresistible that it was a consolidation to eliminate competition, or to monopolize or dominate the market. But Mr. Rogers is introduced into the project that was carried out, with Mr. Rockefeller, strangers in the copper world. With Mr. Daly they organize a holding company, which secures control of these corporations, holds a majority of their stocks, or sufficient to

dominate them. These strangers might have thought copper stocks excellent investments. They might have thought it wise, taking no further thought than that good dividends would be returned and the market price advance, to buy some of these stocks. But why get control of each of the companies? And why organize another company to hold the stocks thus acquired? Mr. Burrage, whose testimony discloses, but only very feebly discloses, the effort he made, somewhat resentfully, not to say petulantly, not to tell anything more than he had to—Mr. Burrage, on whose testimony reliance is placed to justify the existence of this institution, is unable to tell why it was either necessary or desirable to organize the Amalgamated. Witness the following testimony:

> "I cannot tell you why Mr. Rogers and associates, having acquired the control of these stocks which subsequently were transferred to the Amalgamated, he and his associates did not hold them, or why a separate corporation was organized which became the holder of these stocks; it is not within my knowledge as to why Mr. Rogers did not or did do a thing."
>
> Record, pages 968-969.

It was organized for the same reason that the Northern Securities Company was organized, to hold the stocks of Mr. Hill and his associates — enough to control — of the Great Northern, Northern Pacific and Burlington, and for identically the same reason that that corporation was held to exist in violation of the Sherman law, this must be.

It was recently held upon the authority of the Northern Securities case that the acquisition by a holding company of the stocks of two competing coal companies presents the case of a combination in violation of the Sherman act.

U. S. *v.* Reading Co., 226 Fed., 229, 271, 272.

That case is direct authority in support of the contention of the appellants as to the illegal character of the Amalgamated organization.

It was no doubt in anticipation of some express adjudication to that effect that the Amalgamated passed out of existence, and the title to the properties of all the companies it controlled was placed in the Anaconda.

The Sherman Anti-trust Act was not intended to prevent the ordinary and usual contracts made in the course and development of a successful business, by which it is extended. But any departure from that course, as a consequence of which competing concerns are combined, is denounced by it.

In United States *v.* Union Pacific R. R. Co., 226 U. S., 61, Mr. Justice Day elucidated the "rule of reason," declared in the Standard Oil and Tobacco Company cases. In the course of the opinion he said that it was in those cases "pointed out that the statute did not forbid or restrain the power to make *normal* and *usual* contracts to further trade by resorting to all *normal* methods." Indeed, he but adopted the language of Chief Justice White in the Tobacco Company case.

In the brief of the Attorney General, in what is known as the Anthracite Coal Company case, the following propositions are said to be deducible from the decisions of the Supreme Court, viz:

> "(*a.*) Any combination, not the 'result of normal methods of industrial developments,' which by destroying competition between traders tends in the long run, if not immediately, to enhance prices and produce the other evils of monopoly, restrains and monopolizes trade.
>
> "(*b.*) That a combination is not the 'result of normal methods of industrial development' may be determined by its own 'inherent nature or effect.'
>
> "(*c.*) Where it does not appear from the 'inherent nature or effect' of a combination that it is not the 're-

> sult of normal methods of industrial development,' the question must be determined in the light of all the surrounding circumstances of the given case, including the purpose of the parties (Standard Oil Co. *v.* U. S.; U. S. *v.* Am. Tobacco Co.)."

Recurring to the case with which the brief deals, the author adds:

> "Applying these principles to the present case, we have competition destroyed forever between two corporate owners, producers, buyers, and sellers of anthracite coal engaged in interstate commerce, by vesting control of each in a third corporation—a mere holding company—not itself engaged in mining or selling coal or any other business."
> Brief, p. 150.

And then the following observation in line with ideas heretofore advanced is made:

> "Whilst within limits the acquisition and operation of the plants of competitive companies by a corporation actually engaged in trade may be deemed an incident of normal growth, the acquisition of the stocks of two or more such companies by a holding corporation, not itself engaged in trade, for the purpose of centralizing control, is no more a normal method of developing trade than the similar centralization of control in common trustees under the old form of trust. In such case, the holding company, indeed, is but the old trust in corporate form (Brief, p. 152)."

The views thus expressed are fully vindicated by the decision in the "Harvester Trust" case and by the opinions of the majority of the court.

Because it has been said that the Amalgamated has never been guilty of any "unfair competition" through which its rivals were wrecked that they might be absorbed, the fol-

lowing is quoted from the opinion of Judge Hook, exonerating the International Harvester Company from accusations of that character:

> "It is but just, however, to say and to make it plain that in the main the business conduct of the company toward its competitors and the public has been honorable, clean and fair. Some petty dishonesties were tracked in at the start, mostly some subordinates who had been in the service of the old company, but they were soon gotten rid of. In this connection it should also be said that specific charges of misconduct were made in the Government's petition which found no warrant whatever in the proof. They were of such a character and there was so much of them, apparently without foundation, that the case is exceptional in that particular."
>
> U. S. *v.* Int. Har. Co., 214 Fed., 987-1002.

The organization was outlawed, not because of the methods it pursued, but because it came into existence and had its being in defiance of the law thus announced:

> "Suppression of competition where the parties to a combination control a large portion of the interstate or foreign commerce in the articles, and where there is no obligation to form the combination arising out of the fact that the parties to the same are losing money or the like, has been held an undue restraint of trade. See
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> Continental Wall Paper Co. *v.* Voight & Sons, 212 U. S., 227.
>
> Same *v.* Same, 143 Fed., 939.
>
> Swift & Co. *v.* United States, 196 U. S., 375.
>
> Addyston Pipe Co *v.* United States, 175 U. S., 211; 85 Fed., 271.
>
> Chattanooga Foundry Co. *v.* Atlanta, 203 U. S., 390.
>
> Montague *v.* Lowrey, 193 U. S., 38."

There can be no doubt that if the six companies whose stock the Amalgamated obtained at the outset of its career—

all prosperous, all vigorous—had entered into an agreement with each other to fix the price at which they would sell their product, providing therein that none should sell at a price less than that thus agreed upon, the contract would have been in plain violation of the statute. The same result was achieved by the control which the Amalgamated secured over them. It could not consult its own interest thereafter and allow these companies to compete. Touching this phase of the inquiry before us, equally presented in the Harvester case, the court, in the opinion therein, said:

> "We think it may be laid down as a general rule that if companies could not make a legal contract as to prices or as to collateral services they could not legally unite, and as the companies named did in effect unite the sole question is as to whether they could have agreed on prices and what collateral services they could render when their companies were all prosperous and they jointly controlled 80 to 85 per cent of the business in that line in the United States. We think they could not have made such an agreement.
>
> Continental Wall Paper Co. *v.* Voight & Sons, 212 U. S., 227.
>
> Same *v.* Same, 148 Fed., 939.
>
> Addyston Pipe Co., *v.* United States, 175 U. S., 211.
>
> Swift & Co., *v.* United States, 196 U. S., 375."

And then, in line with the idea heretofore advanced, borrowed from it, that the acquisition by the Anaconda of any one, possibly two, of the weaker companies might not be illegal, the opinion continues:

> "If the five companies which formed the International had been small and their combination had been essential to enable them to compete with large corporations in the same line, then their uniting would, in the light of reason, not have been in restraint of trade, but in the furtherance of it; but when they con-

> stituted the largest manufacturers of their articles in America, if not in the world, and held jointly about 80 to 85 per cent of the trade, and two at least of the companies forming the combination were prosperous, their combining was, when similarly viewed, an unreasonable restraint of trade."

Either the Anaconda or the Boston & Montana, when control of them passed to the Amalgamated, "might have stood against the world." Not one of the companies absorbed was shown to be in financial straits and was not. The essential facts presented here and thus far canvassed are identical with those with which the court dealt in the Harvester case, save that the consolidating companies therein considered controlled 80 to 85 per cent of the trade, those entering into the present combination from 25 to 45. It is impossible to differentiate the cases on that basis.

A further similarity appears. The opinion referred to continues:

> "The International is not only a great manufacturing company, but by the American Company is a great dealer in agricultural implements in interstate and foreign commerce, and so the case comes more nearly within the ruling in Addyston Pipe Co. *v.* United States, 175 U. S., 211, than United States *v.* Knight, 156 U. S., 1."

Not only was each of the subsidiary companies in this case a dealer in copper, selling through a sales agency in all the markets of the world, but that agency, becoming the United Metals Selling Company, in which Mr. Rogers was a stockholder from its organization,about the time the Amalgamated came into being, is now controlled by the Anaconda, which owns all its capital stock, so that the last-mentioned company is not only the greatest producer of copper in the world, but it is the greatest dealer in the world in that commodity.

The basis upon which it is believed the Amalgamated may escape the condemnation of the statute was not made clear at the argument. Much was made of remarks appearing in various opinions of the courts to the effect that the restraint of trade accomplished must be something more than an indirect, incidental interference, not the immediate, necessary or probable result. But what was the main result to be accomplished to which the other result was only incidental? It is said that the consolidation was to effect economies. A similar reason has been assigned, and rarely without justification in the event, for the existence of every trust that ever came into being. It is confessed that, as a rule, economy of operation may be effected through relatively large units. But the people of the nation, while offering no obstacle, so far as the law is concerned, to the development of gigantic enterprises by "usual methods" or by making "normal and usual contracts," have chosen rather to maintain competition than to enjoy the advantage that may flow from combination.

In this connection it may be said that the power to regulate prices is by no means the only, though it may be the most commonly recognized, reason that makes monopoly objectionable or that induced the passaage of the Sherman act.

See International Harvester Co. v. Missouri, 234 U. S., 199, in which the character of the plaintiff in error was said to arise from the fact that there was "a union of able competitors and a cessation of their competition."

The Colorado Company chose rather, while it maintained an independent existence, to operate its own smelter than to have its ores treated at the Anaconda; so the Butte & Boston, and Heinze, and so, with his great business capacity and sagacity, did Senator Clark. It was not until they were each dominated by the Amalgamated that, the policy of the constituent companies in that regard underwent a change.

They did not have their ores smelted at Anaconda, because there would have been a smelter charge which would have more than overcome the loss incident to the operation of their less efficient works. That system would have impoverished them to enrich the companies which owned the smelters that were operated. It was profitable for the stockholders of the two greater companies to have the other smelters dismantled and profitable, of course, for the interests that dominated them all. But the subject of economy must have presented itself in quite a different aspect to the minority stockholders of the lesser corporation.

So, likewise, as to the apex controversies said to have had a part in the matter. If the Amalgamated were the only holder of stock in any of the subsidiary companies, it would be of no consequence as to how those controversies were adjusted. Under the organization perfected, the power was placed in the Amalgamated to resolve them as best suited its interest. The minority holders were obliged to trust to its generosity and its justice. A judge is not allowed to sit in a cause in the result of which he is interested, so frail does the law recognize humanity to be. The law has no reason to approve of a combination either to effect such economies, or as a substitute for the courts in the resolution of apex controversies.

But there is no answer in any of these suggestions as to why the Amalgamated, the holding company, was organized. The economies referred to were made possible, not by the organization of the Amalgamated, but by the acquisition by the same persons of enough of the stock of the constituent companies to control them. If the same individuals held a majority of the stock of each, the same result would be possible. There was no occasion for a holding company to effect any such purpose. Hill and his associates might have elected directors of the Northern Pacific, the Great Northern and Burlington, controlling the

stock of each as they did when they organized the Northern Securities Company. The trouble was that control of one company might at any time get away. That company might start cutting rates or otherwise begin to compete. It was to ensure the maintenance of control over all three roads that the holding company was formed. The Amalgamated had its origin about the same time and it was organized with a similar purpose.

The consolidation out of which this litigation grows, the merging of all these companies in the Anaconda, is in the way of acceptance of the theory of economy advanced in justication of the organization of the Amalgamated. It was to effect economies that the new merger was accomplished, we are told. The old arrangement could not have permitted them if that is true. But the real reason for the new arrangement was given by Mr. Kelley to the witness Blum—the Federal Government is opposed to holding companies. An idea prevailed that the holding company could not be justified under the law. And there is no room for it in our industrial organization. It serves no purpose except the purpose of monopoly. So the District Court of the Eastern District of Pennsylvania held in the Reading case above cited.

As pointed out by President Van Hise an idea obtained that by uniting the property in one corporation the ban of the law might be avoided. An individual may acquire property, it was argued, in unlimited amount. Why not a corporation? But when subjected to the test, this court held that the form which the consolidation takes is of no consequence. Immunity was claimed for the American Tobacco Company, because it had itself become the owner of the properties of the companies it absorbed, or at least it was claimed that it could not be divested of the properties so acquired. But Chief Justice White, speaking of what had been decided in the Standard Oil case, said of the law that it

"embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute."

The Harvester Trust was formed on this plan. Referring to the language above quoted, the court said, in its opinion in the suit brought by the Government to dissolve it, after reciting the language last above quoted:

"No weight is attached therefore to the means by which the combination was formed if a combination within the purview of the statute was created. That it was a combination of five companies is clear. The fact that this combination took the form of a new corporation is immaterial.

U. S. *v.* American Tobacco Co., 221 U. S., 106.
U. S. *v.* E. I. du Pont de Nemours & Co., 188 Fed., 127.

"Was this combination in restraint of trade? It substantially suppressed all competition between the five companies, and the restraint of competition between combining companies is as illegal as destruction of competition between them without combining."

The U. S. Steel Corporation acquired the properties of the companies absorbed by it, but the transaction fell, notwithstanding, under the condemnation of the court.

U. S. *v.* U. S. Steel Corporation, 223 Fed., 178.

The Can Trust and the Kodak Trust have both been outlawed since the case was first argued.

U. S. *v.* Am. Can Co., 220 Fed., 859-901.
U. S. *v.* Eastman Kodak Co., 226 Fed., 62.

A mining company may prolong its life by the acquisition of adjacent mining property in the ordinary course of business, by making "normal and usual contracts" and by the "normal methods of industrial development," but if these terms mean anything they cannot include a process by which a corporation having capital of $30,000,000 becomes one with a capital of $150,000,000, the additional stock being exchanged for properties of other companies engaged in a like business. Either the Red Metals Company was already controlled by the Amalgamated as the evidence compels us to believe, or it was engaged in competition with the former. If it was, then its absorption in 1910 was in violation of the Sherman act. Either the Alice Company was controlled by the Amalgamated or it was a potential competitor in the production of copper and the acquisition of its property was in contravention of the Sherman act. For no one can assert that it is in accordance with "normal methods" of industrial development for one corporation to go out into the market and purchase a majority of the shares of another corporation and then force upon the minority stockholders a sale or rather an exchange for stock in either the purchasing company or a third company. If it be so, " 'tis a custom more honored in the breach than in the observance."

It is impossible to doubt that the Amalgamated hoped to find the Alice properties copper-bearing.

It appears that the Anaconda is by exactly the same process gathering unto itself for some more stock which it contemplates issuing, the properties of the International Smelting and Refining Company figured at $19,000,000, including a copper and lead smelter in Utah, a copper refinery in New Jersey and a lead refinery in Indiana.

It has already acquired extensive interests in Arizona and Mexico—holding stock in the Inspiration and Greene-Cananea, and is now constructing a smelter in Arizona.

Doubtless the projectors of the Amalgamated had in mind

that they would dismantle the smelter of the Colorado and the Butte & Boston, of Heinze and of Clark, and that they would otherwise institute economies, but, as pointed out, all trusts make like claims as a justification for their existence.

In the answer in the Harvester case was the following paragraph:

> "23 They aver that the purpose of the formation of the International Harvester Company was to secure large economies in the manufacture of harvesting machinery and other agricultural implements by producing more cheaply and of better quality the principal raw materials required therefor; by enlarging the facilities and at the same time correcting the wasteful methods then employed in the distribution of such machines and which ultimately would have resulted in higher prices, or in serious curtailment of the service and credit extended to the farmers; by extending the foreign trade in such machines and implements, and by better organized experimental and inspection departments, making the machines and implements more durable and efficient, without increasing their cost to the farmer."

It has ever been contended that if such is the "paramount object" or if there be a paramount purpose, the restraint of trade that ensues from a combination of competing companies not coming about in "the ordinary course of industrial development," the law sanctions it. It was strenuously insisted upon in the Union Pacific case and disallowed by the court. If the purpose denounced by the act be present, or if the power to restrain trade exists by virtue of the consolidation, it is immaterial that there may be another purpose more potent in inducing the combination.

U. S. *v.* Union Pacific, 226 U. S., 61.

Nor is it of consequence that the power has not been used to raise prices or otherwise oppress the public.

In the Harvester case the court quotes from one of the opinions of this court to the effect that:

> "All the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."

In the Union Pacific case the court said:

> "It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act."

In a late case presenting many features strikingly like those that are paramount in this one, the court said:

> "The power under and pursuant to the combinantion to do the prohibited things is what brands it (the combination) as illegal, not the actual exercise of that power, although when a plaintiff sues for damages he must, of course, show the combination, its operation, and that it has resulted in damages to him. And of course, to bring a combination of this character within the condemnation of the statute, it is not necessary to show that a complete and United States wide monopoly has been actually created, or that the entire trade or business and production of an article has been brought within the control of the combination, or ever will be. It is no defense for such a combination to show that there is still some competition and some competitors, and that the acts of the combination do not wholly and entirely control interstate commerce in the article or absolutely fetter it. If the combination be one in restraint of trade or commerce among the several States to any substantial degree, it is within the condemnation of the statute."
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> O'Halloran *v.* Am. S. G. S. Co., 207 Fed., 187.

As heretofore asserted, the only difference in the essential facts surrounding the organization of the Amalgamated and the International Harvester Company is that the latter controlled a greater proportion of the trade. But the Amalgamated controlled as large a proportion of the copper production—say 30 per cent—as did the Reading Holding Company of anthracite. Touching this phase of the case the Attorney General says in his brief:

> "If it be said that the Reading Holding Company, through its ownership of the stock of the Reading Railroad Company and the Reading Coal Company, controls only part of the trade in anthracite coal, the answer is that the Supreme Court has held over and over again that it need not be shown that the combination, in fact, results in a total suppression of trade, or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition. (Northern Securities Co. *v.* United States, 193 U. S., 197, 332.")

And then he calls attention to the language of the second section of the act, which prohibits a monopoly of "any part" of trade or commerce, quoting from the opinion in Standard Oil *v.* U. S., 226 U. S., 161, as follows:

> "The commerce referred to by the words 'any part,' construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance, that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce."

The question of the unlawful character of the Amalgamated Copper Company, not in its acts but in its organization, has thus far been canvassed as though the testimony

of Mr. Lawson were not in the record, because at the argument below counsel seemed to assume that the case rested, so far as that phase of it goes, upon what was said by the witness. It may be totally disregarded and no warrant can be found in the law or the decisions under it for such an industrial combination as is being considered. The necessary inferences from its history condemn it.

It is conceded that giving credence to the evidence of Lawson, the institution exists in violation of the law. It developed, according to him, pursuant to a plan to monopolize the copper production of the world. It followed hard upon the heels of the inglorious failure spoken of as the Secretan debacle, as the court knows historically. It may be that the purpose to take in the Rio Tinto mines was shadowy, a thing thought of rather than deliberately entered upon. It may likewise be that the acquisition of all the mines of the United States was regarded as an end ultimately to be reached rather than immediately to be attained, but that this corporation was organized as the "copper trust," intending through it to dominate the copper production of this country at least, there is no room for serious question, nor is there reason to doubt what Mr. Lawson tells about it. Indeed, it is not suggested upon what basis the court can discard this evidence or fail to give full value to it. There is nothing inherently unbelievable about it. Mr. Lawson is unimpeached upon this record. It was somewhat vehemently asseverated at the argument below that his character as a stockbroker and his reputation as a writer of sensational magazine articles required the court to ignore his contribution to the history of this interesting venture in the field of high finance. The writer knows of no rule of law that will permit the court to inform itself in any such manner. The witness gave his testimony in a manner altogether creditable. His story is uncontradicted in any of its essential features even by Mr. Burrage. It certainly suffers nothing in point of candor,

frankness or credibility by comparison with that of the latter. The court cannot get the impression from the testimony of Mr. Burrage that he was making any effort whatever to enlighten anybody.

The total contribution of Mr. Lawson in the organization of the Amalgamated, according to Burrage, is that Mr. Lawson made "some suggestions."

Let us inquire as to what Mr. Lawson says he did aside from making "some suggestions." In the pursuit of his business as a stockholder he gathered up for the Amalgamated promoters some of the stocks that went into the consolidation, Anaconda, B. & M., B. & B., and Parrot.

Though the Boston companies did not go in until later, the witness was even before 1899 accumulating the stocks of those companies for Mr. Rogers. He advertised in the Boston Herald of May 8, 1899, that the Amalgamated was formed to take over *"all sound producing copper companies"* that promised to pay 8 per cent. It will be remembered that the company itself put out an advertisement asking for subscription to its shares. The Lawson advertisement was published to induce them, and the two were printed in adjacent columns of the same paper.

Mr. Lawson tells that he wrote the company advertisement. The statement then made by Lawson, publicly in such a way as that it must have been brought to the notice of the projectors of the Amalgamated, the adventurers, to use a more appropriate term which proved offensive to Mr. Burrage, touching their purpose, is in entire accord with the testimony he now gives in relation to the same matter. Just why the great copper producing properties were thus to be put in common ownership, the witness tells with a directness coming from a conviction that a great public good was to be achieved by the consolidation. This is what he says:

> "In the carrying out of our general scheme, the general scheme which was contemplated all the way through, it would have been very essential to have the marketing of the whole product of the different mines controlled or owned by the consolidated company, as the very foundation idea of the whole scheme was the control of the price of the metal, control to an extent that we could keep the price from the wild fluctuations that had been the history of copper metals from the beginning. In other words, a control that would have enabled us to establish a fair price and to hold that fair price through the ups and downs of general business, through the periods when the metal would be in strong demand, when the demand would let up, and there would be accumulation or over-production, a temporary over-production, and the very essential of that would be a control in the sense which I stated, of the selling, of the getting of the metal to the consumer."
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> Record, Vol. II, pages 703-704.

Even if such a purpose could be considered as beneficent in character it is condemned by the law and the transaction is not saved by the good intentions of the parties to it.

In the Bathtub Trust Case, 226 U. S., 49, Mr. Justice McKenna said:

> "The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results (United States *v.* Trans-Missouri Freight Asso., 166 U. S., 290; Armour Packing Co. *v.* United States, 209 U. S., 56, 62)."

The intent with which the combination assailed in this case was formed is clear from its history without this direct evidence of the ends sought to be accomplished by its projectors, but the intent in this case is of very little consequence, the necessary effect of the combination being to

place in the Amalgamated the power to restrain trade, the proof of intent to accomplish such restraint is unnecessary. It is only where it does not appear that the "inherent nature and effect" of the combination is to restrain trade that the proof of intent becomes material.

Justice Lurton said in

United States *v.* Reading Co., 226 U. S., 324, 370:

> "Of course, if the necessary result is materially to restrain trade between the States, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important. (U. S. *v.* St. Louis Term. Assoc., 224 U. S., 383, 394; Swift *v.* U. S., 196 U. S., 375)."

By virtue of the combination effected, the Amalgamated might at any time close down the Washoe or the Colorado, or the Parrot or the Butte & Boston or the Boston & Montana or the Anaconda or any two or more or all of them, cutting the copper output of the country 33 1-3 per cent. These companies were producing about 220,000,000 pounds of approximately 250,000,000 issuing from all the mines of Montana in 1899, being about 36 per cent of the world's production, and about one-half of the total output of the United States. The capital assembled was greater than that of any industrial organization which this country ever knew or has since known, the United States Steel, the American Tobacco Company and the Standard Oil Company alone excepted. If it is not one of the organizations at which the Sherman act was aimed, its language and the history of the times in which it was enacted, the debates in Congress that attended its passage, are alike without any lesson.

Reliance is placed upon the Calumet and Hecla case now practically overruled as recited above. The highest respect is due to the views of the late Justice Lurton expressed therein; but no student of the decisions dealing with the

Sherman act can fail to recognize, as the business world recognizes, that those of more recent date have given a vigor and efficacy to that statute that was denied to it by the courts at an earlier period in its history.

It might, had it come to this court, have met the fate of the Union Pacific-Southern Pacific case, which was here reversed, without any dissent. The decision in the Calumet & Hecla case is put by Justice Lurton and by the learned district judge below squarely upon the principle announced in the Knight case. President Taft declared that that case had been overruled by the Supreme Court. Many able lawyers agree with him and agree likewise that the statute would have been an innocuous thing if the doctrine of the Knight case had not been repudiated. The writer does not believes it has been overruled, but he believes that if the Knight case were now prosecuted the result would be different. It announced what seems to the writer an incontrovertible doctrine, namely, that given a case which presents only a question of production within a State, and the Sherman act is inapplicable; that notwithstanding its pains and penalties, companies who do all their business within a State, who therein manufacture a product that will eventually in whole or in part find its way into interstate commerce, may consolidate as they please without violating the Sherman act.

One can conceive of a half dozen sugar-beet factories in Montana which do no interstate business at all. They get all their beets in Montana and sell their product at the factories to buyers who take it away. The Sherman act cannot reach them. The arm of the Federal law cannot touch them. The Knight case was tried as though it presented such a case. Doubtless the sugar companies involved did, in fact, transport their product beyond the State of Pennsylvania for sale, were indeed engaged in interstate commerce, but if so, either the attorneys for the Government

failed to make the proper averment or that feature of the case was disregarded by the court. The writer does not pretend to say whether the Knight case was or was not properly applied in the Calumet & Hecla case. It is neither governing nor persuasive here. It clearly appears that each of the companies besides being engaged in *producing* copper in Montana was engaged in transporting for sale and selling it through sales agents all over the world. And it further appears that at the very time the Amalgamated was organized, the United Metals Selling Company came into existence, with Mr. Rogers as one of the stockholders, that it handled the product of the Amalgamated companies and was eventually absorbed by it. Mr. Lawson declares that its organization was a part of the general plan of control pursuant to which the project was launched in the first place.

The Knight case has been appealed to in the case of every trust condemned by the Supreme Court or the inferior courts since it was decided. (See U. S. *v.* Am. Tobacco Co., 164 Fed., 700, in which its inapplicability to the ordinary trust case is demonstrated by three of the judges comprising the court.)

Reliance was placed upon it in the Harvester case, but it was disposed of by the court in a brief paragraph heretofore quoted. As if to meet the conditions with which it dealt, the International Harvester Company organized a selling company to which each factory turned over its product in the State in which it was situated. The court found this subterfuge unavailing.

It is insisted that upon each of the grounds urged the sale in question should be adjudged to be null and void, and that this court should direct a decree accordingly.

Respectfully submitted,

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